237(a)(3) of the Act; and (3) established that his removal from the United States would cause an exceptional and extremely unusual hardship to a spouse, parent, or child, who is a U.S. citizen or lawful permanent resident. *See* INA § 240A(b)(1).

C. Good Moral Character

The ten-year period of good moral character is calculated backward from the date on which the final administrative decision is entered by the Immigration Judge or the Board. *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007). INA §101(f) lists several classes of individuals for whom good moral character cannot be established if a Respondent falls into one of those classes during the ten (10) year period. The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

Respondent does not fall into any of the classes listed in INA 101(f). Respondent testified that he had two (2) arrest for no driver's license in 2013 and a DUI from 2018. Respondent was convicted of the DUI on August 6, 2020.

Respondent stated on his application that he filed income taxes for the years 2007, 2008, 2009 and 2011. Respondent stated he did not file taxes after that because he was paid in cash. The documents do not contain the I.R.S. tax transcript to establish that the documents were actually filed with the government.

Additionally, respondent admitted on direct examination that he has worked in various jobs like construction, factories, pipes but mostly construction. Respondent even stated that he has worked consistently since 2017 for [redacted] and has not filed taxes. Respondent also stated he earned approximately $600.00 a week while working for [redacted]. If this information is correct, respondent would have earned approximately $31,000 for each year since 2017 and has not filed taxes on any of that income.

On cross examination, Respondent admitted that he obtained a false Social Security number in order to work in the United States. Respondent also denied owing money to the I.R.S. until the Department pointed out the tax document from the I.R.S. on page 27 of Exhibit 4 which states Respondent owes $5,306.57. Respondent stated he has not paid that money to the I.R.S. On cross examination, the government pointed out that respondent has claimed his sister and her three (3) children on his taxes. Respondent admitted that he sends money to them in Mexico and that he does not provide 50% or more of their support. He admitted to obtaining their documents to obtain an ITIN number and to claiming them on his taxes and received a refund for them.

The court views this cumulatively in the negative and finds that Respondent has not established that he has good moral character based on his efforts to defy the laws of the United States government by working with a false Social Security number, claiming individuals he does not support and obtaining a refund for those individuals. Respondent then failed to pay his taxes and stopped filing taxes when he was paid in cash. Respondent has not filed taxes since 2011. Respondent has three (3) criminal arrests in the United States, two (2) for driving without a license and a conviction for driving under the influence. Therefore, the Court finds that Respondent has not established good moral character as required for cancellation of removal.

D. Criminal Convictions

Respondent does not have any criminal convictions under sections 212(a)(2), 237(a)(2), or 237(a)(3) of the Act.

E. Exceptional and Extremely Unusual Hardship

Even if Respondent established good moral character, Respondent failed to establish his children would experience exceptional and extremely unusual hardship if he were removed to Mexico. Respondent has two U.S. citizen children: [redacted], and [redacted].

Respondent testified that [redacted] has health problems in which he suffers from speech issues. Respondent has been diagnosed with speech delay and the therapy diagnosis is mild to moderate expressive language delay. The only documents submitted were limited and contained a medical letter from a doctor who recommended that [redacted] undergo a full psychoeducational evaluation through the school. A report from 2019 was presented which showed the child was diagnosed with speech delay. Respondent admitted that although [redacted] has been diagnosed with speech delay and therapy has been recommended, he has not started any type of speech therapy. According to the documents in Exhibit 4, Respondent has been diagnosed with a speech delay since August 2019 and neither Respondent nor his wife have obtained speech therapy services for him.

Respondent stated the children would remain in the United States if he were deported. He does not believe that he would be able to support them financially. The Court notes that Respondent's children receive Medicaid and food stamps.

The Court acknowledges Respondent's family may experience some financial and emotional hardship upon his removal. Nonetheless, the evidence does not establish they would experience hardship substantially beyond that which is ordinarily expected from the removal of a loved one. The children have Medicaid and are receiving food stamps. The mother, [redacted] has work authorization and is working approximately forty (40) hours a week at the [redacted] and is able to provide for her children. The oldest child is currently attending school virtually due to the schools being closed due to the pandemic. Respondent's oldest child, [redacted] is in need of speech therapy which has been recommended since August 2019. Respondent nor [redacted] have started [redacted] in speech therapy even though it was recommended over a year ago.

Therefore, the Court finds that Respondent has not met the burden to establish exceptional and extremely unusual hardship as required of cancellation of removal.

F. Discretion

Had Respondent satisfied the statutory requirements, Respondent is not deserving of discretionary relief. In balancing the equities of Respondent's case, the Court finds the negative factors outweigh any positive factors Respondent may have presented. The positive factors in Respondent's case include his U.S. citizen children and that he has been in the U.S. since 2006. Respondent also submitted numerous letters of support from friends and family members.

The Court also notes that Respondent may have committed tax fraud. Respondent admitted to using a false Social Security number to obtain employment in the United States. In the tax documents he presented, he filed as head of household and claims his sister and her children – all who live in Mexico and in which he stated he does not provide 50% of their support. He used their documents to obtain an ITIN number for them and to obtain a federal refund for them. Additionally, Respondent presented a document from 2014 which shows that he owes the I.R.S. $5306.57 from 2012 and he admitted he has not paid that debt. Although Respondent has worked since 2012, he has not filed and paid taxes since 2011. Respondent has three (3) criminal arrests in the United States, two (2) for driving without a license and a conviction for driving under the influence.

Considering the equities of the Respondent's case which includes his family ties, and length of time in the United balanced against the negative factor, i.e., his criminal history, possible tax fraud, lack of community involvement and the interests of the United States, the Court finds that Respondent does not merit a favorable exercise of discretion.

1. Voluntary Departure

Respondent also requested post conclusion voluntary departure. After reviewing the evidence submitted into the record, the Court will grant Respondent's request for voluntary departure. Respondent has been in the United States since 2006. He is not removable pursuant to sections 237(a)(2)(A)(iii) or 237(a)(4) of the Act. He has established good moral character for the five (5) years immediately preceding his application for good moral character. Respondent has one (1) conviction for DUI from 2020. Respondent has two (2) United States citizen children who could potentially petition for him in the future. Upon weighing the equities of Respondent's case to balance the totality of the evidence, the Court concludes that Respondent does merit a favorable exercise of discretion for the purposes of voluntary departure. Therefore, the Court grants Respondent's request for post conclusion voluntary departure under safeguards.

After reviewing the evidence submitted into the record, the Court grants Respondent's request for post conclusion voluntary departure under safeguards.

Accordingly, the following orders shall be entered:

ORDERS: **IT IS HEREBY ORDERED that Respondent's application for cancellation of removal for certain nonpermanent residents is DENIED.**

IT IS HEREBY FURTHER ORDERED that Respondent be GRANTED post conclusion voluntary departure under SAFEGUARDS to Mexico. Respondent must depart the United States on or before [redacted].

IT IS FURTHER ORDERED that, if the Respondent fails to comply with any of the above orders, the voluntary departure order shall without further notice or proceedings vacate the next day, and the Respondent shall be removed from the United States to Mexico on the charge(s) contained in the Notice to Appear.

_____ _____

Date [redacted]
U.S. Immigration Judge

Appeal Date: [redacted]

NOTICE TO RESPONDENTS GRANTED VOLUNTARY DEPARTURE: You have been granted the privilege of voluntarily departing from the United States of America. The Court advises you that, if you fail to voluntarily depart the United States within the time period specified, a removal order will automatically be entered against you. Pursuant to section 240B(d) of the Immigration and Nationality Act, you will also be subject to the following penalties:

1. You will be subject to a civil penalty of not less than $1,000 and not more than $5,000; and
2. You will be ineligible, for a period of 10 years, to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change of nonimmigrant status.

The Court further advises you that:
You have been granted post-conclusion voluntary departure.

1. If the Court set any additional conditions, you were advised of them, and were given an opportunity to accept or decline them. As you have accepted them, you must comply with the additional conditions. 8 C.F.R. § 1240.26(c)(3).
2. The Court did not set a specific bond amount but has granted voluntary departure under safeguards. *See Matter of M-A-S*, 24 I&N Dec. 762 (BIA 2009).
3. If you have reserved your right to appeal, then you have the absolute right to appeal the decision.
4. If you do not appeal and instead file a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or extended, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act – will not apply. 8 C.F.R. § 1240.26(c)(3)(iii), (e)(1).
5. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulations, the Court has set the presumptive amount of $3,000. 8 C.F.R. § 1240.26(j).

NOTICE OF THE RIGHT TO APPEAL: You are hereby notified that both parties have the right to appeal the Immigration Judge's decision in this case to the BIA. 8 C.F.R. § 1003.38(a). A Notice of Appeal (Form EOIR-26) must be submitted to the BIA within 30 calendar days from the issuance or mailing of this decision. 8 C.F.R. §1003.38(b). If the final date for filing falls on a Saturday, Sunday, or legal holiday, the filing date is extended to the next business day. *Id.* If no appeal has been taken within the time allotted to appeal, the Immigration Judge's decision becomes final. *Id.* By failing to timely file an appeal, a party irrevocably relinquishes the opportunity to obtain review of the Immigration Judge's decision and challenge the ruling.

NOTICE OF CONSEQUENCES OF FAILURE TO DEPART: The Court has ordered you removed from the United States. If you willfully fail or refuse to apply for the required travel documents to depart the United States, to present yourself for removal as instructed, to depart the United States as instructed, or to take any action, or conspire to take any action, to prevent or hamper your departure, you will be subject to a civil monetary penalty of not more than $500 per day you are in violation. INA §§ 240(c)(5), 274D(a); 8 C.F.R. § 1240.13(d).

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P) ECAS (E)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN'S ATTY/REP [ ] DHS

DATE: _____ BY: COURT STAFF _____

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Applicant Details

First Name	**Edward**
Last Name	**Hershewe**
Citizenship Status	**U. S. Citizen**
Email Address	**edwardhershewe@yahoo.com**
Address	**Address** **Street** **1121 S Gilbert St apt 406, 406** **City** **Iowa City** **State/Territory** **Iowa** **Zip** **52240** **Country** **United States**
Contact Phone Number	**4174998353**

Applicant Education

BA/BS From	**Carleton College**
Date of BA/BS	**March 2020**
JD/LLB From	**University of Iowa College of Law** **http://www.law.uiowa.edu**
Date of JD/LLB	**May 12, 2023**
Class Rank	**Not yet ranked**
Law Review/Journal	**Yes**
Journal(s)	**Iowa Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Van Oosterhout-Baskerville**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Sakoda, Ryan
ryan-sakoda@uiowa.edu
3194674864
Diamantis, Mihailis
mihailis-diamantis@uiowa.edu
319-335-9105
Guernsey, Alison
Alison-guernsey@uiowa.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

District Judge Leslie Abrams Gardner
U.S. District Court, Middle District of Georgia
Chambers of Judge Leslie Abrams Gardner
201 West Broad Avenue
Albany, Georgia 31701

Dear Judge Gardner,

I am a recent graduate from Iowa College of Law, and I would like to be considered for the clerkship in your chambers for the 2024 term. I recently read your opinion in *Gamache v. Hogue*. I found your analysis of ERISA and the attorney-client privilege issues compelling and interesting. I was inspired to apply for a position in your chambers after reading the case.

During my time at Iowa Law, I have developed strengths in legal research, analysis, and writing, and I know given these skills I will be an asset in the speedy resolution of federal cases. I believe that the best legal writing emphasizes clarity, consistency, and understandability. I have spent my time on the *Iowa Law Review*, in the Federal Criminal Defense Clinic, competing on the Baskerville Moot Court Team, and externing for the Honorable Willie J. Epps, Jr., focused on honing these skills. I look forward to continuing to hone these skills next year as an associate at Polsinelli in Kansas City where I will be working on complex civil matters.

Outside of my academic skills, I believe I have the attitude required to succeed as your clerk. While in college, I ran cross country and track. The teams were communities built on respect and commitment to achieving both individual and team success. We emphasized hard work but also ensured that the experience was enjoyable for all. I learned what it meant to work with others towards a common goal and how to pursue individual achievement at the same time.

I have enclosed my resume, writing sample, letters of recommendation, and transcript. Thank you for your time and consideration, and I look forward to hearing from you.

Sincerely,
Edward Hershewe

EDWARD HERSHEWE

1121 South Gilbert Street, Apt 406 Iowa City, IA 52240
ehershewe@uiowa.edu 417-499-8353

Education

The University of Iowa College of Law, Iowa City, IA J.D., Anticipated May 2023
GPA: 3.68 (Top 20% of the class)
Activities: *Iowa Law Review*, Managing Editor 2022–23, Student Writer 2021–22.

Carleton College, Northfield, MN May 2020
B.A. in History and Political Science
GPA: 3.48
Theses: History-*Conceiving Chivalry* | Political Science-*Crafting Cosmopolitan Conversations and Curriculums*
Athletics: Varsity Cross Country and Track 2016–20, Team Captain 2019–20.

Experience

Polsinelli, P.C. **Kansas City, MO**
Associate Fall 2023 (anticipated)
Summer Associate Summer 2022

- Researched and drafted memorandum on state and federal law for civil litigation issues, including TCPA class actions, contract suits, insurance claims, medical malpractice, jury instructions, expert witness reports, and evidentiary issues relating to *Daubert* motions, hearsay, and business records for cases.

University of Iowa Federal Criminal Defense Clinic **Iowa City, IA**
Law Student Practitioner Jan 2023—present

- Represented a client in a 3-count felony drug indictment in the U.S. District Court for the Southern District of Iowa. Cross examined a case agent, researched and drafted a suppression motion, calculated U.S. Sentencing Guidelines ranges, drafted Rule 17 subpoenas, engaged in fact interviewing, and conducted client counseling.
- Mooted colleagues for Sixth and Seventh Circuit arguments.
- Researched and evaluated the strength of compassionate-release and executive clemency cases and the impact of potential U.S. Guidelines amendments.

Baskerville Moot Court Competition Team **Iowa City, IA**
Competitor Spring 2022—present

- Selected for participation on the competitive team after both oral and written performance in the law-school based Van Oosterhout-Baskerville Domestic Competition.
- Participated in the McGee Civil Rights Moot Court Competition. Drafted a brief and conducted oral argument on the quantum of proof required for administrative searches. Brief placed 6 out of 24.

United States District Court for the Western District of Missouri **Jefferson City, MO**
Judicial Intern to Magistrate Judge Willie J. Epps, Jr. Summer 2021

- Drafted memorandum regarding biometric search warrants and speedy-trial issues.
- Evaluated motions in civil and criminal matters and made disposition recommendations.
- Assisted in drafting and editing law review articles on Black judges in America, judicial outreach programs for at-risk youth, and various social justice issues.

INTERESTS: Reading · Chess · Running · Dungeons and Dragons · Outer Space · Music

THE UNIVERSITY OF IOWA

STUDENT GRADE REPORT

Name:	Edward Hershewe
University ID:	01424457
Month/Date of Birth:	07/04
Date Generated:	06/02/23 11:23 AM

Degree(s) from other institution(s):
BA Carleton College, Northfield, MN 2020

Previous/Transfer institution(s) summary:
Carleton College, Northfield, MN 2016-2020

**********START ACADEMIC RECORD**********

Course Number	Course Title	Sem Hrs	Grade
Fall 2020 / College of Law [1]			
LAW 8032	Legal Analysis Writing and Research I	2.0	3.4
LAW 8037	Property	4.0	3.4
LAW 8046	Torts	4.0	3.6
LAW 8017	Contracts	4.0	3.8
LAW 8026	Introduction to Law and Legal Reasoning	1.0	P

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	14.0	3.57	14.0	15.0
UI Cum:	14.0	3.57	14.0	15.0

Spring 2021 / College of Law [1]				
LAW 8006	Civil Procedure	4.0	3.4	
LAW 8460	Evidence	3.0	3.5	
LAW 8033	Legal Analysis Writing and Research II	3.0	3.7	
LAW 8010	Constitutional Law I	3.0	3.9	
LAW 8022	Criminal Law	3.0	4.0	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	16.0	3.68	16.0	16.0
UI Cum:	30.0	3.63	30.0	31.0

Fall 2021 / College of Law				
LAW 8146	Antitrust Law	3.0	3.5	
LAW 8504	Corporate Crimes	3.0	3.6	
LAW 9882	Public Health Law	3.0	3.7	
LAW 8350	Criminal Procedure: Investigation	3.0	4.1	
LAW 8121	Adv Legal Res Methods Specialized Subj *Litigation and Alternative Dispute Resolution*	1.0	P	
LAW 9010	Appellate Advocacy I	1.0	P	
LAW 9115	Law Review	1.0	P	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	12.0	3.73	12.0	15.0
UI Cum:	42.0	3.66	42.0	46.0

Spring 2022 / College of Law				
LAW 8791	Professional Responsibility	3.0	3.6	
LAW 8433	Environmental Law	3.0	3.8	
LAW 8755	Nonprofit Org Advcy Collabrtn Fundraisng	3.0	3.8	
LAW 8331	Business Associations	3.0	4.1	
LAW 9021	Van Oosterhout Baskerville Mt Ct Comp	1.0	P	
LAW 9115	Law Review	1.0	P	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	12.0	3.83	12.0	14.0
UI Cum:	54.0	3.69	54.0	60.0

Fall 2022 / College of Law				
LAW 8399	Election Law	3.0	3.2	
LAW 8497	Federal Criminal Practice	2.0	3.2	
LAW 8373	Secured Transactions	3.0	3.3	
LAW 8280	Constitutional Law II	3.0	3.7	
LAW 9558	Corporate Boards Seminar	2.0	4.1	
LAW 9037	Advanced Moot Court Competition Team	1.0	P	
LAW 9060	Trial Advocacy	2.0	P	
LAW 9118	Student Journal Editor-Law Review	1.0	P	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	13.0	3.48	13.0	17.0
UI Cum:	67.0	3.65	67.0	77.0

Spring 2023 / College of Law				
LAW 8481	Federal Courts	3.0	3.2	
LAW 9302	Clinical Law Program: Internship	9.0	4.0	
LAW 9046	Moot Court Board	1.0	P	
LAW 9118	Student Journal Editor-Law Review	2.0	P	
LAW 8428	British Legal System	2.0	3.7	

	Graded Hrs Att	GPA	Graded Hrs Earned	Hrs Earned
UI Term:	14.0	3.79	14.0	17.0
UI Cum:	81.0	3.68	81.0	94.0

[1] ***University operations and instruction continued to adapt to the global public health emergency. Many course offerings and modalities were impacted, which in turn may have affected an individual student's experience in each course.***

**********END ACADEMIC RECORD**********

Hours and Points Summary

The Hours and Points Summary includes transfer credit in the "Overall Cumulative" GPA and "Overall Earned" hours (not necessarily hours towards degree). This summary is only informational and will not appear on your official transcript. Your official transcript is only your University of Iowa hours and GPA as displayed above "***END ACADEMIC RECORD***"

	Hours	Points	GPA
UI Cumulative	81.0	297.70	3.68
Transfer Cumulative	0.0	0.00	0.00
Overall Cumulative	81.0	297.70	3.68
Overall Earned	94.0		
Transfer Earned			

June 01, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I enthusiastically recommend Edward Hershewe for a clerkship in your chambers with absolutely no reservations. I met Edward during his second year of law school when he was in my Criminal Procedure: Investigation course. Edward did tremendously well in the course, receiving one of the highest grades in the class. He has shown his exceptional abilities outside of the classroom as well. Edward is a managing editor of the Iowa Law Review, actively involved in moot court, and a dedicated clinical student.

Edward was one of the standout students in my Criminal Procedure: Investigation course. He was always well prepared and engaged in class, making valuable and interesting contributions during class discussions. Edward also frequently attended office hours to continue the discussions that were initiated in class, seeking to refine his understanding of the law. Not only did Edward have a strong interest in the subject matter covered in Criminal Procedure: Investigation, but it was abundantly clear that Edward has a genuine interest in learning the nuances and complexities of the law more generally. Edward did not simply ask questions with the aim of preparing for the exam, he sought a deeper understanding of the cases. I am confident that this inherent interest and desire to learn will be valuable in a clerkship and in his future legal career.

Edward's intelligence, diligence, and meticulous preparation were reflected in his final exam. His exam was one of the top three in the class of 43 students. His grade in the course, a 4.1, is one of the highest grades you can receive on the Iowa Law grading scale and, given Iowa's tough mandatory curve, reflects a truly superb performance in the course. My exam incorporated two complex issue-spotters and a policy question. Edward showed his thorough knowledge of the material in his responses to the issue-spotters as well as a tremendous ability to identify and discuss numerous legal issues under very tight time constraints. Furthermore, Edward demonstrated an impressive understanding of the nuances of the criminal procedure doctrine in his response to the policy question. Based on his performance in my course, I have no doubt that Edward would be a fantastic law clerk.

In addition, Edward's work outside the classroom further bolsters his qualifications for a clerkship. Edward is an active and valuable member of the law school community, participating in moot court, serving as the managing editor of the Iowa Law Review, and taking on peer advising and research assistant positions as well. His selection for the Baskerville Moot Court Team reflects his strong legal research, writing, and oral advocacy skills. Furthermore, the moot court competition gave him additional opportunities to refine and polish his skills in high pressure and competitive contexts. As a member of the Iowa Law Review, Edward was entrusted by his fellow law review members to be one of the managing editors. The role of the managing editor is among the most important on the law review, involving substantial communication with the authors of forthcoming articles, as well as substantive edits to the forthcoming articles. The managing editors also take on the important role of working with and mentoring student writers in the fall semester. Edward's selection as a managing editor not only reflects the respect that Edward's classmates have for his intellectual ability, but also their recognition of his ability to collaborate well with others and efficiently produce results under strict deadlines. Furthermore, Edward has gained valuable experience as a student in the Federal Criminal Defense Clinic, where he has provided direct representation for a client charged in Federal Court, researched and written briefs and motions, and appeared in court to argue on behalf of his client.

These valuable experiences along with Edward's tremendous research, writing, and analytical skills make him an outstanding candidate for a clerkship. Moreover, Edward is a joy to be around. I thoroughly enjoyed our conversations during office hours and after class. I have no doubt that Edward would be a wonderful addition to your chambers, and I recommend him for a clerkship with absolutely no reservations. I would be happy to answer any questions you have and can be reached at ryan-sakoda@uiowa.edu.

Sincerely,

Ryan T. Sakoda
Associate Professor of Law
University of Iowa College of Law

May 30, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I write in support of Edward Hershewe's application for a clerkship in your chambers. I have known Edward since Spring 2021, when he was a 1L in my Criminal Law course. He performed exceedingly well, receiving the sixth highest grade out of 90 students. Edward was quick on his feet and always prepared to answer questions, whether to display his appreciation of the relevant facts of a case or to hazard a position on a thorny policy issue. He was also an active force in class discussion, asking questions about challenging concepts and benefitting his fellow students in the process. During office hours and outside of class, Edward is unreserved and cordial.

I'd be happy to discuss Edward's application further using any of my contact information.

Sincerely,

Mihailis E. Diamantis
Professor of Law
University of Iowa
College of Law

Mihailis Diamantis - mihailis-diamantis@uiowa.edu - 319-335-9105

May 30, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

Edward Hershewe requested that I write a letter of recommendation on his behalf for a law-clerk position with your chambers, and I am happy to do so.

I am a Clinical Professor at the University of Iowa College of Law where I run the Federal Criminal Defense Clinic. As part of that Clinic, law students represent indigent defendants charged with offenses in the U.S. District Courts for the Northern and Southern Districts of Iowa. We also handle criminal appeals in the U.S. Courts of Appeals for the Eighth, Seventh, and Sixth Circuits.

Mr. Hershewe is one of the students enrolled in my Clinic, and I have interacted with him on a daily basis for the past five months. I also had the pleasure of supervising Mr. Hershewe as he competed on the Baskerville Moot Court Team. Given our close and consistent working relationship, I am confident in my understanding of Mr. Hershewe's strengths as a clerkship candidate. Although he has many qualities that would make him a wonderful clerk, there are three that I would like to highlight.

First, Mr. Hershewe is bright and intellectually curious. During his time in the Clinic, Mr. Hershewe has shown great comfort working on complex legal issues with comparatively little direction. As an example, Mr. Hershewe is counsel in a case that has involved the need to analyze the applicability of several relatively new U.S. Sentencing Guideline enhancements. These enhancements have huge consequences but have been interpreted very infrequently. Despite having never opened the Guidelines Manual before enrolling in Clinic, Mr. Hershewe was able to do a full sentencing workup without a single error and argue coherently for the position that we should take during plea negotiations based on his research. When I praised his accurate, efficient, and goal-focused work, he responded by telling me that reasoning through "regulations and statutes" was one of his "favorite tasks," as he simply enjoys "figuring out the puzzle."

This curiosity and intellect have emerged time and time again, as he helped moot fellow Clinic students for a habeas argument in the Seventh Circuit; a § 3582(c) argument in the Sixth Circuit; and a contested supervised-release revocation hearing in the Northern District of Iowa. Perhaps nothing demonstrates his love for knowledge and puzzles more than the fact that when I gave him the choice to present to the class on any non-legal topic of his choosing, he chose the Fermi paradox.

Second, Mr. Hershewe is a hard worker. He is the first student in the Clinic every morning —always before 8:00 am —and typically the last student to leave. His willingness to work is limited only by the hours in the day and whatever deadline the case or I have imposed. But that is not to say that Mr. Hershewe is unable to do anything other than work. He has a wonderful sense of humor and is a very enthusiastic storyteller. He makes the long hours enjoyable.

Third, Mr. Hershewe is a very strong legal researcher. In both my capacity as his professor and faculty advisor for moot court, I have had the opportunity to evaluate, in depth, Mr. Hershewe's research and writing skills, and they place him near the top. His writing is clear, and he has shown great skill in being able to distinguish and analogize authority in a convincing and accurate fashion. When I conduct my parallel research, I have yet to come across a case that he has not found and accounted for in his analysis.

In short, given his intellect, his work ethic, and his legal research and writing skills, I believe Mr. Hershewe would make a wonderful clerk. I recommend him without hesitation.

Sincerely,

Alison K. Guernsey
Clinical Professor

Alison Guernsey - Alison-guernsey@uiowa.edu

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

The attached writing sample is an excerpt from an appellate brief I wrote for the Van Oosterhout-Baskerville Domestic Competition at Iowa College of Law during the 2022 spring semester. Specifically, I was required to draft a brief on behalf of the Appellant, the Big Box, who was being sued under ERISA for a breach of fiduciary duty by its former employee Wally Worker. As the appellant I argued the Seventh Amendment right to a jury trial does not apply to ERISA section in question and so the District Court had correctly struck the motion for a jury trial. To reduce the length of the document, Argument I and related sections have been omitted.

ISSUES PRESENTED

II. The Seventh Amendment guarantees the right to a jury trial in suits at common law. The plaintiff is bringing an action under ERISA §502(a)(2) for reimbursement of a retirement account. Did the district court abuse its discretion by striking the jury trial?

SUMMARY OF THE CASE

Appellant, Big-Box Stores Inc. is a national retailer. R. at 3. Big-Box has five stores in the state of Hawkeye with over 360 employees. *Id*. Appellee was an employee of Big-Box in Hawkeye. *Id.* at 4. As a part of his employment, he received health insurance benefits and a retirement fund. *Id.* Under the health insurance plan, Appellant spent an average of $1.24 on employee health care. *Id.*

At the time of Appellee's employment, Hawkeye had a law in place called the Hawkeye Health Act ("HHA"). *Id.* at 3. The law required that any for profit employer in Hawkeye had to pay a minimum of $2 per hour worked by an employee towards employee healthcare. *Id.* at 8. To meet this minimum a firm could: (1) deposit money into a healthcare savings account belonging to the employee, (2) reimburse employees for healthcare expenditures, or (3) pay the city, who would create and maintain reimbursement accounts for the employees. *Id.*

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

Appellee worked for Appellant for over a year before getting cancer. *Id.* at 4. While being treated, Appellee realized Appellant's average amount of spending on healthcare was below the minimum HHA requirements. *Id.* at 6. Appellee sued Appellant for violating the HHA and requested backpay. *Id.* at 11. Appellant moved for summary judgement on the HHA claim, arguing ERISA preempts the law. *Id.* at 13–14. The trial court held the act is not preempted and denied summary judgment. *Id.* at 18–19. Appellant appealed the denial of summary judgement. *Id.*

Appellee also sued claiming Appellant had breached its fiduciary duty. *Id.* at 11. Appellee alleged that the Howard Keel as sole manager of the retirement account owes fiduciary duties to Appellee. *Id.* Appellee contends that he was assured the funds would only be put in safe investments. *Id.* at 10–11. Appellee argued that investing part of the funds in cryptocurrency constitutes a breach of fiduciary duty. *Id.* Appellee sought an order to compel Appellant to reimburse the plan for all the money lost from the investments. *Id.*

During proceedings Appellant successfully motioned to strike the jury claiming that most circuits hold ERISA claims carry no jury trial right. *Id.* at 7. Appellant showed ERISA does not grant the right to a jury trial and so a jury trial can only be granted by the Seventh Amendment. *Id.* at 15–16. Appellant explained that the Seventh Amendment applies to legal claims not equitable claims. *Id.* Appellant argued that Appellee's claim is equitable because he seeks reimbursement for the plan, not damages, and the claim is rooted in trust law, which were traditionally handled by equity courts. *Id.*

In the trial court's motion striking the jury trial, the court conducted a two-part inquiry into the claim and the remedy sought to determine if the suit is entitled to a jury trial. *Id.* at 19–21. The court found the ERISA claim and remedy to be equitable and so held Appellee's claim is

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

not entitled to a jury trial. *Id.* Appellee appealed the trial court's motion striking the jury trial. *Id.* at 23.

SUMMARY OF THE ARGUMENT

ERISA claims are not entitled to a jury trial because no such right is listed in the statue and the claims are not granted the right by the Seventh Amendment. This court must look at the comparable common law actions and the remedy sought to determine if a suit is legal or equitable in nature. If both these factors are equitable then this court should hold the suit is equitable and ERISA claims do not get a jury trial. This court must affirm the district court's motion striking the jury trial.

STANDARD OF REVIEW

Circuit Court and Supreme Court decisions recognize for that appellate review using the abuse of discretion standard "is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice." *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 435 (1996).

II. THE DISTRICT COURT DID NOT ERR IN ITS MOTION TO STRIKE A JURY TRIAL BECAUSE THE ERISA §502(A)(2) CLAIM AND REMEDY ARE EQUITABLE AND THUS NOT ENTITLED TO A JURY TRIAL.

A plaintiff bringing an ERISA §502(a)(2) claim does not have the right to a jury trial when the nature of the action and remedy sought are equitable in nature. ERISA §502(a)(2) allows for participants and beneficiaries of a plan to bring a suit for breach of fiduciary duty to recover appropriate relief. 29 U.S.C. § 1132(a)(2) (2018). ERISA does not provide plaintiffs a statutory right to a jury trial. But the Seventh Amendment to the United State Constitution provides the right to a jury trial "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. However, this right to a jury trial does not

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

extend to all causes of actions. The Supreme Court has repeatedly held that the right to a jury trial does not extend to suits involving only equitable rights and remedies.

The Fourteenth Circuit Court of Appeals should affirm the district court's motion striking a jury trial. The Court should require the plaintiff to bring forth a legal cause of action to assert his jury trial right. First, the court should follow precedent and the majority of Circuits that hold ERISA claims are equitable and not entitled to a jury trial. Second, the Court should hold that the plaintiff's action is equitable in nature because the restitution action is equitable and ERISA breach of duty claims are rooted in trust law, which is in the realm of equity. Lastly, the Court should hold that the remedy sought by the plaintiff is equitable because plaintiff seeks only to be reimbursed for the amount owed under the plan.

A. Supreme Court Precedent and the Majority of Circuits Hold that ERISA Claims are Equitable and not Entitled to a Jury Trial.

Since the merger of the courts of law and equity, the Supreme Court has historically interpreted the phrase "suits at common law" as referring "'to suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.'" *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564–65 (1990) (quoting *Parsons v. Bedford*, 28 U.S. 433, 446–47 (1830)).

In 2002, in *Great-W. Life & Annuity Ins. Co. v. Knudson* the Supreme Court held that ERISA §502(a)(3) claims are not within the scope of the Seventh Amendment right to a jury trial, because under the statute such claims only allow for equitable relief. 534 U.S. 204, 213 (2002). In the aftermath of *Knudson*, it was unclear whether §502(a)(2) claims are also considered equitable and likewise not afforded the right to a jury trial. Specifically, because §502(a)(2) provides individuals the right to sue for relief on behalf of the plan, while §502(a)(3)

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

provides the right to sue for equitable remedy on their own behalf. 29 U.S.C. § 1132(a). The Supreme Court has not ruled on whether the nature and remedy in §502(a)(2) claims are equitable or legal.

Since *Knudson*, the majority of courts hold that no right to a jury trial exists for plaintiffs bringing ERISA claims because the action and remedy available are equitable in nature. In *O'Hara v. Nat'l Union Fire Ins. Co. of Pitt.* the Second Circuit held "there is no right to a jury trial in a suit brought to recover ERISA benefits." 642 F.3d 110, 116 (2d Cir. 2011). Likewise, the Sixth Circuit in *Reese v. CNH Am. LLC* held "the Seventh Amendment does not guarantee a jury trial in ERISA . . . cases because the relief is equitable rather than legal." 574 F.3d 315, 327 (6th Cir. 2009). Additionally, in *Mathews v. Sears Pension Plan* the Seventh Circuit stated, "there is no right to a jury trial in an ERISA case . . . [because] ERISA's antecedents are equitable." 144 F.3d 461, 468 (7th Cir. 1998). Lastly, the Fifth Circuit has also held "ERISA claims do not entitle a plaintiff to a jury trial." *Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994).

As can be seen by the case law from other circuits the issue of whether ERISA claims are equitable or legal and thus entitled to a jury trial is an already settled matter. If this Court should decide to go again this precedent, it would risk creating disparate results and treatment in the judiciary. Upsetting a major tenant of the judicial system to ensure fair and equal treatment throughout the country. Thus, since the claim before the court emerges from ERISA the court should hold has a preliminary matter that the Plaintiff is not entitled to a jury trial to ensure the fair treatment across the circuits and the court system.

B. The Nature of the Plaintiff's Action is Equitable Because the Comparable 18th Century Common Law Actions were Handled by Courts of Equity.

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

Even if this Court is reluctant to follow the majority that holds ERISA claims are not entitled to a jury trial as a preliminary matter, a closer inquiry into this specific matter will prove the district court did not err is its motion to strike the jury trial. When a federal statute does not explicitly provide for the right to a jury trial under the Seventh Amendment, as is the case with ERISA, courts engage in a two-step inquiry. *Terry*, 494 U.S. at 564–65.

Since the right to a jury trial applies only to actions that are legal in nature not equitable, this inquiry, as outlined in *Tull v. United States*, is to determine if the case is more akin to those cases tried in courts of law or cases tried in courts of equity. 481 U.S. 412, 417–18 (1987). First, the court must "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Id.* Second, the court must examine "the remedy sought and determine whether it is legal or equitable in nature." *Id.* If both these prongs lean in favor of equity, then the plaintiff is not entitled to a jury trial. *Id.*

1. The plaintiff's action for restitution is comparable to common law restitution in equity, which would not provide the plaintiff the right to a jury trial.

When conducting its inquiry into the first step the district court correctly concluded that the comparable common law claim was equitable restitution. In its motion to strike the jury trial the district court held that the plaintiff was not entitled to a jury trial because nature of the plaintiff's claim is equitable in nature not legal due to its similarity to common law restitution in equity. The first step of the inquiry compares the present-day cause of action to the similar action at common law. *Terry*, 494 U.S. at 564–66. Specifically, this inquiry compares the rights at issue and the nature of the suit. *Id.* In these cases, the court will look at the analogous common law actions to determine which one best fits the case at hand. *Tull*, 481 U.S. at 417. Thus, if the claim is similar to common law restitution in equity, then district court did not err in its motion to strike the jury trial.

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

For courts to determine whether restitution is legal or equitable they must look at the "the basis for the plaintiff's claim and the nature of the underlying remedies sought." *Knudson*, 534 U.S. at 213–14 (2002). Restitution at law occurs whenever "[a] plaintiff [can't] assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him." *Id.* While for restitution in equity the plaintiff "must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214–16.

In the case *Great-W. Life & Annuity Ins. Co. v. Knudson*, the Supreme Court looked to see if a plaintiff's §502(a)(3) claim for restitution was equitable or legal. *Id.* at 210–14. Knudson had been in a car wreck and suffered injuries requiring serious medical treatment. *Id.* at 207. At the time the Knudson was covered by her husband's employer's health plan which paid for about eighty percent of the medical expenses. *Id.* at 207–08. The remaining twenty percent was to be paid an insurance company. *Id.* The plan also included a reimbursement provision that allowed the insurance company to bring suit to recover for any money that the beneficiary was able to recover from a third party. *Id.* at 208–09. After Knudson reach a successful settlement in a state-court tort action against a third-party car manufacturer. *Id.* The insurance company suit against Knudson seeking restitution for the funds she recovered from the car manufacturer. *Id.*

The insurance company was claiming restitution in equity, however the Supreme Court concluded that the restitution the insurance company was seeking was in fact restitution at law. *Id.* at 212. When evaluating the company's claim the Supreme Court concluded that the basis of their claim was not that Knudson held funds belonging to the insurance company. *Id.* at 214–15. Instead, the Court found that the claim was based around the belief that the company was

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

contractually entitled to some of the funds Knudson received for the benefits it had conferred. *Id.* Therefore, the Court held the insurance's company's action was restitution at law not in equity because it did not seek "the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon respondents." *Id.*

Here the kind of restitution the plaintiff seeks is restitution in equity because he is seeking an action to enjoin action in some property which he has a right to possession. This action is unlike the insurance company's suit in *Knudson*, which sought to recover funds that they had not title or right to possession. The plaintiff in the case at hand is seeking restitution in equity because the money sought can be traced to a constructive trust in the form of his retirement account set up and managed by Howard and Big-Box. The plaintiff's restitution claim revolves around the funds from the retirement account, which the plaintiff has a possessory right to.

Additionally, as the district court correctly noted in its motion striking a jury trial plaintiff's is not seeking funds in the form of punitive damages. Rather he is merely seeking that his retirement account is restored to the condition and amount it was at before the money was lost. Again, this is different from *Knudson* which saw the plaintiff seeking to recover for monetary damages. In Knudson the action was restitution at law because the company sought legal relief through the imposition of liability. However, here the plaintiff's claim seeks to reimburse the account by requiring action by the Defendants. Therefore, in the case at hand nature of the claim more closely resembles restitution in equity because it is seeking to restore the funds to plaintiff. The plaintiff does not want to impose liability on the Defendants. Since his action is similar to the common law claim of restitution in equity, he is not entitled to a jury trial.

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

Thus, the district court was correct in its inquiry into the first step because it ruled that the nature of the plaintiff's ERISA claim was equitable and did not entitle the plaintiff to a jury trial.

2. *A comparable common law action is breach for fiduciary duty under trust law, which was handled by courts of equity and not afforded a jury trial.*

Not only is the nature plaintiff's action equitable because it is similar to restitution in equity but ERISA's roots in the common law of trust also cause ERISA claims to be equitable. The Supreme Court has long acknowledged that trust common law provides the foundation for ERISA. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110–11 (1989). At common law actions involving a trustee's breach of fiduciary duty were equitable actions and tried in courts of equity and so were not provided with the right to a jury trial. *Id.* Thus, if the plaintiff's action for breach of fiduciary duty is similar to the common law trustee's breach of duty action then the plaintiff is not entitled to a jury trial.

In *Mertens v. Hewitt Assocs.* the Supreme Court considered the nature of ERISA §502(a)(3) claims. 508 U.S. 248, 252–53 (1993). In *Mertens*, the plaintiffs were the employees of the defendant's steel plant. *Id.* at 250–52. The plaintiffs had been part of the defendant's pension plan but due to changes in the business, the plan became underfunded and was terminated causing the plaintiffs to only receive their ERISA benefits not their larger pensions from the plan. *Id.* The plaintiffs sued for a breach of fiduciary duties alleging that the defendant had breached its duty by allowing the plan to fail and failing to disclose its shortcomings. *Id.*

When examining whether the plaintiffs' actions were legal or equitable the Supreme Court turned to the historical roots of ERISA. *Id.* at 255–56. The Court found that the common law of trusts served as the basis for much of ERISA. *Id.* Reasoning that a beneficiary's interest in bringing an ERISA §502 claim for breach of duty is similar to the interest of a trust beneficiary bringing an action of breach of duty against a trustee. *Id.* At common law the courts of equity

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

held exclusive jurisdiction over actions regarding trusts. *Id.* at 255–62. The Court applying this to ERISA found that since in the courts of equity actions involving a trust could only afford a plaintiff equitable relief, the suits brought under ERISA are equitable in nature and can only be afforded equitable remedy. *Id.* The Court held that since trust common law is basis for ERISA it makes ERISA claims equitable and only allows for equitable relief not for legal remedy. *Id.* at 260–63. Additionally, the Court found that this idea is within the congressional purpose of ERISA §502, which is to protect plan participants and beneficiaries. *Id.*

The trust common law principles that the *Mertens* Court held made up the basis of the ERISA claim are also serve as the root of the ERISA claim in the present case. Even though this case revolves around §502(a)(2) rather than §502(a)(3) the trust common law roots that the *Mertens* Court believed formed the foundation for such ERISA claims still apply to this case. Even though §502(a)(2) allows plaintiffs to sue for damages or equitable relief with respect to a plan unlike §502(a)(3), which allows for individual relief limited to equitable relief, the claims are still rooted in breaches of fiduciary duty. Thus, the right at issue and the nature of the action are analogous to trust suits and are equitable in nature.

Additionally, the retirement account set up and managed by the defendant for the plaintiff shares many similarities with a common law trust. The plaintiff's retirement account essentially operates as a constructive trust with Howard as the manager. Just like *Mertens* the present case revolves around a perceived breach of duty for a constructive trust. In *Mertens* the plaintiffs were claiming that the defendant mismanaged pension account was a breach of duty. While in the case at hand the plaintiff is claiming that the defendant's poor investment choices amounted to a breach of duty. Both these cases resemble common law trust actions because the retirement account operate as constructive trust, with the defendants operating as a trustee. Since at

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

common law actions for a breach of duty against a trustee were handled by courts of equity, ERISA claims for breach of duty are equitable because trust common law serves as the basis for these claims. Therefore, the district court did not err in its motion striking the jury trial because the analogous common law action is equitable, so the plaintiff's claim is equitable.

C. The Nature of the Relief Sought is Equitable not Legal and thus does not Afford the Plaintiff the Right to a Jury Trial.

Moving onto the second step of the inquiry, the district court correctly concluded that remedy sought is equitable and thus is not entitled to a trial by jury. After examining the similar common law action for the nature of a plaintiff's claim the court turns to the second step of the inquiry. *Terry*, 494 U.S. at 564–66. In this second step, which courts regard as the more important of the two, the court must examine the remedy sought to determine if it is legal or equitable. *Id.* ERISA §502(a)(2) allows for relief in the form of restoring to the plan any loses or profits the fiduciary may have caused and other forms of equitable and remedial relief the court may deem necessary. 29 U.S.C. § 1132(a)(2). Thus, if the relief the plaintiff seeks under ERISA §502(a)(2) is equitable then he is not entitled to a jury trial.

There is no clear test for determining if the remedy sought is equitable or legal in nature. Most courts hold money damages are a form of legal relief because they were traditionally offered in courts of law, however, just because relief is monetary doesn't necessarily mean it is legal relief. *Terry*, 494 U.S. at 570–71. When monetary damages are awarded incidental or in conjunction with injunctive relief, they may be equitable. *Tull v. United States*, 481 U.S. 412, 423–25 (1987). While equitable relief is relief that was traditionally offered in the courts of equity. *CIGNA Corp. v. Amara*, 563 U.S. 421, 439–40 (2011). The Supreme Court has stated that "'[e]quitable' relief must mean something less than all relief," believing that equitable reliefs are

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

those that were offered in equity. *Knudson*, 534 U.S. at 213 (2002) (quoting *Mertens*, 508 U.S. at 259 n.8 (1993)).

In the case *Mass. Mut. Life Ins. Co. v. Russell*, the Supreme Court examined the form of relief appropriate under ERISA §409, which ERISA §502(a)(2) allows for the civil action for relief under. 473 U.S. 134, 140–41 (1985); 29 U.S.C. § 1132(a)(2). In *Russell* the plaintiffs brought a breach of duty action against their employer for improper and poor management of their benefits plan. *Russell*, 473 U.S. at 136–38. Bringing their action under ERISA §409, the remedy the plaintiffs sought were either extra-contractual compensatory or punitive damages. *Id.* The Ninth Circuit held for the plaintiffs finding that §409 authorizes recovery of extracontractual damages because the statute allows for "remedial relief as the court may deem appropriate." *Id.* (quoting 29 U.S.C. § 1109(a)). The Supreme Court reversed, holding §409 does not allow for extra-contractual or punitive damages. *Id.* at 148. The Court reached this conclusion after determining that §409 did not provide for individual relief, but instead §409 limited relief for the plan, which the Court characterized as equitable relief. *Id.* at 141–44. Moreover, the Court examined the legislative history and found it was not Congress's intent that the phrase "remedial relief as the court may deem appropriate" include contractual or punitive damages. *Id.* at 145–48 (quoting 29 U.S.C. § 1109(a)).

Later in *CIGNA Corp. v. Amara*, the Supreme Court considered the situation where monetary and equitable relief are intertwined. 563 U.S. at 439. In that case retiring employees sued their employer for converting their benefit plan from a pension plan to a cash balance. *Id.* at 424–29. The employees sought equitable relief to get the court to reform the plan and return the benefit that the employees had previously held. *Id.* The Court found that equitable relief meant relief which was traditionally offered in courts of equity. *Id.* at 439–40. The Court found that the

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

power to reform a plan, is one that historically has been given to equity courts because they could reform contract terms. *Id.* at 440–42. The Court stated that even though the reformation of the plan would cause the plaintiffs to be granted monetary remedy this did not take the relief out of the realm of equity. *Id.* The Court held that monetary compensation for loss from a breach of duty of this kind is equitable and based in common law of trusts used in equity courts. *Id.*

Here the relief the plaintiff seeks is equitable because he does not seek to recover contractual or punitive damages only to recover the benefits owed under the plan. As outlined in *Russell,* a plaintiff cannot be granted contractual or punitive damages under ERISA §502(a)(2). Similarly, the plaintiff here is simply seeking reimbursement for the money that was lost from his retirement account. This form of relief is unlike the legal remedies sought in *Russell* and more like the equitable relief outline in the statute. Thus, the relief sought in this case is equitable because it seeks to restore the account to its prior position.

Moreover, the fact that this equitable relief may take the form of monetary compensation to reimburse the plaintiff's retirement account has no bearing on the equitable nature of the relief sought. As shown *Amara*, monetary compensation can still be equitable. Here the monetary compensation is like that seen in *Amara*, which saw compensation for changes made to a plan's structure. In this case the monetary compensation is to help restore funds that the plaintiff lost through the mismanagement of the account. In both cases the funds are used to help return the plaintiff's accounts to the position they would have been prior to the incident.

Additionally, the type of reimbursement sought in this case is a type of equitable relief that was traditionally offered in courts of equity. As *Amara* discussed monetary remedy was often administered at common law in trust actions for breaches of fiduciary duty. Here the retirement account essentially operates as a constructive trust with managed by the Defendant.

Edward Hershewe
1121 S. Gilbert Street | Iowa City, IA 52240 | (417) 499-8353 | ehershewe@uiowa.edu

Therefore, the same equitable remedies that were administrable at common law are administrable in this case. Since the nature of the relief sought is equitable the plaintiff is not entitled to a jury trial and so the district court did not err in its motion to strike the jury trial.

The inquiry into the two-step test of the nature of the action and the remedy sought proves that the plaintiff's ERISA case is equitable in nature and remedy, so it is not entitled to a jury trial. This finding is in line with the majority of Circuits that hold ERISA claims are not entitled to a jury trial under the Seventh amendment because they are equitable. Thus, this Court should hold that the district court did not err in its motion to strike a jury trial and affirm the ruling.

CONCLUSION

This court should affirm the district court motion striking the jury trial because the Seventh Amendment does not apply to ERISA because it is an equitable statute.

Applicant Details

First Name	**Diego**
Middle Initial	**G**
Last Name	**Huerta**
Citizenship Status	**U. S. Citizen**
Email Address	**dgh46@georgetown.edu**
Address	**Address** Street **423 9th St. NE** City **Washington** State/Territory **District of Columbia** Zip **20002** Country **United States**
Contact Phone Number	**5206035707**

Applicant Education

BA/BS From	**University of Arizona**
Date of BA/BS	**May 2021**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**June 5, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Environmental Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Pasachoff, Eloise
eloise.pasachoff@law.georgetown.edu
202-661-6618
Krisnakumar, Anita
ak1932@georgetown.edu
Argentieri, Sabrina
argentieri.sabrina@epa.gov
202-564-8953

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Diego Huerta
423 9th St. NE
Washington, D.C. 20001
Dgh46@georgetown.edu
(520) 603-5707

June 12, 2023

Honorable Judge Leslie Abrams Gardner
United States District Court for the Middle District of Georgia
C. B. King United States Courthouse
201 West Broad Ave.
Albany, GA 31701

Dear Judge Gardner:

Thank you for the opportunity to apply for a clerkship in your chambers. I am applying to this position because I would like to contribute to the work you do and deepen my understanding of the federal courts. I believe that I am a good candidate for this position due to my strong academic background, diverse set of career experiences, and passion for justice.

During my time at the University of Arizona, I maintained perfect grades and studied environmental and natural resource law. I also worked in a variety of scientific fields and developed the critical thinking skills necessary to succeed as a scientist. In graduate school, I produced an extensive master's thesis, and developed community outreach materials explaining complex scientific findings to a lay audience.

In law school, I have engaged deeply with the theory and practice of law. I have taken and succeeded in many classes critical to the work courts do every day, such as constitutional law, administrative law, statutory interpretation, and evidence. I am also a member of the Georgetown Environmental Law Journal, which has significantly improved my writing skills and understanding of environmental issues.

During my time working at the EPA and the DOJ, I have learned a great deal about prosecuting and defending civil actions in the enforcement and rulemaking context, honed my attention to detail, and developed my legal reasoning skills. This experience is invaluable to my understanding of the courts and has led to a strong interest in how courts manage cases and reach their decisions.

Given my experience in both scientific and legal research and writing, as well as my performance in law school, I believe that I have a lot to contribute to this clerkship. Federal courts are important to me not just as forums for the practice of environmental law, but as guardians of civil order. I am excited for any opportunity to become more familiar with them.

Sincerely,
Diego Huerta

Diego Huerta

(520) 603-5707 | diegohuerta@email.arizona.edu

Education

Georgetown Law School **Washington, DC**
J.D. Law Expected May 2024
GPA: 3.83

University of Arizona **Tucson AZ**
M.S. Environmental Science August 2021
GPA: 4.00

Experience

U.S. DOJ, Environmental and Natural Resources Division **Washington D.C.**
Law Clerk Summer 2023

- Writing/reviewing court filings and legal research memos in cases defending environmental rulemakings and government facilities.
- Opportunities for trial preparation, Clean Water Act enforcement work, and deposition review.

U.S. EPA, Office of Civil Enforcement, Air Enforcement Division **Washington, D.C.**
Honors Law Clerk Summer 2022 - Fall 2022

- Drafted motions, referrals, and legal/scientific research.
- Reviewed inspection materials and prepared inspection report material.
- Participated in EPA training and talks, observed meetings within EPA and settlement discussions with regulated entities.

Georgetown Environmental Law Journal **Washington, D.C.**
Staff/Executive Editor Sept 2022 - Present

- Reviewing and editing citations, proofing academic articles, and writing blog posts and student note.
- Will correspond directly with authors and manage staff in 2023-2034 school year

Integrated Environmental Science and Health Risk Lab **Tucson, AZ**
Undergraduate/Graduate Researcher January 2019 -May 2021

- Wrote undergraduate thesis on national, binational, and international legal

frameworks surrounding binational sewage spill.
- Wrote master's thesis containing risk assessment literature review
- Compared soil, water, plant, and settled dust metal(loid) concentrations with relevant CALEPA, FAO-WHO, USDA, HUD, and EPA primary and secondary contamination standards and screening levels.

Dr. Matthew Goode **Tucson, AZ**
Undergraduate Researcher May 2017 - September 2020
- Presented at local and national natural resource conferences.
- Contributed to writing of internal reports and prepared manuscript on rattlesnake activity modeling for publication.
- Wrote and edited student posts and information for the lab website.

The USA National Phenology Network **Tucson, AZ**
UA NASA Space Grant Intern October 2018 - May 2019
- Performed literature review, data collection and analysis, and modeling of invasive plant phenology in support of agency outreach and public facing data products.
- Contributed edits to staff publication and produced internal white paper reviewing invasive species phenology information.

The Office of Congressman Raúl Grijalva **Tucson, AZ**
Intern Summer 2017
- Performed constituent casework intake and support, liasoning with numerous federal agencies on behalf of citizens.

Publications

Diego Huerta, et al., (2023). Probabilistic risk assessment of residential exposure to metal(loid)s in a mining impacted community, *Science of The Total Environment*, https://doi.org/10.1016/j.scitotenv.2023.162228

Alma Anides Morales, Diego Huerta, Monica Ramirez-Andreotta. (2023, pre-print). Measuring Behavior and Risk Perception to Inform Children's Exposure Assessments and Communication Strategies, http://dx.doi.org/10.21203/rs.3.rs-433981/v1

Record of: Diego G. Huerta
GUID: 843023513

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	95	Civil Procedure David Vladeck	4.00	A	16.00	
LAWJ	002	51	Contracts Michael Diamond	4.00	A	16.00	
LAWJ	003	52	Criminal Justice Louis Seidman	4.00	A	16.00	
LAWJ	005	51	Legal Practice: Writing and Analysis Frances DeLaurentis	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	48.00	4.00
Cumulative	12.00	12.00	48.00	4.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	004	95	Constitutional Law I: The Federal System Paul Smith	3.00	A-	11.01	
LAWJ	005	51	Legal Practice: Writing and Analysis Frances DeLaurentis	4.00	B+	13.32	
LAWJ	007	95	Property John Byrne	4.00	A	16.00	
LAWJ	008	95	Torts Kevin Tobia	4.00	A-	14.68	
LAWJ	025	50	Administrative Law Eloise Pasachoff	3.00	A-	11.01	
LAWJ	611	06	World Health Assembly Simulation: Negotiation Regarding Climate Change Impacts on Health Kathryn Gottschalk	1.00	P	0.00	

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	19.00	18.00	66.02	3.67
Annual	31.00	30.00	114.02	3.80
Cumulative	31.00	30.00	114.02	3.80

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	121	09	Corporations Donald Langevoort	4.00	A	16.00	
LAWJ	1472	05	Energy Law and Policy Kathryn Zyla	2.00	A	8.00	
LAWJ	1491	07	Externship I Seminar (J.D. Externship Program) Deborah Carroll		NG		
LAWJ	1491	131	~Seminar Deborah Carroll	1.00	A-	3.67	
LAWJ	1491	133	~Fieldwork 3cr Deborah Carroll	3.00	P	0.00	
LAWJ	1552	05	Business and Capitalism James Feinerman	1.00	A-	3.67	
LAWJ	1782	08	Statutory Interpretation Theory Seminar Anita Krishnakumar	2.00	A	8.00	
LAWJ	304	05	Legislation Josh Chafetz	3.00	A-	11.01	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	16.00	13.00	50.35	3.87
Cumulative	47.00	43.00	164.37	3.82

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	146	08	Environmental Law	3.00	A	12.00	
LAWJ	1611	05	Administrative Law and Public Administration Seminar	3.00	A-	11.01	
LAWJ	165	09	Evidence	4.00	A	16.00	
LAWJ	1816	05	Breaking Privilege: An In-Depth Analysis of Privilege Issues in the Context of Civil Litigation Valerie Ramos	1.00	P	0.00	
LAWJ	1827	08	Wildlife and Ecosystems Law	2.00	A	8.00	
LAWJ	215	05	Constitutional Law II: Individual Rights and Liberties	4.00	A-	14.68	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	17.00	16.00	61.69	3.86
Annual	33.00	29.00	112.04	3.86
Cumulative	64.00	59.00	226.06	3.83

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am delighted to write this letter of recommendation on behalf of **Diego Huerta, Georgetown Law '24**, who has applied to you for a clerkship. Diego is a strong writer with a personable demeanor and a wry sense of humor. He would meaningfully contribute to the analytic work of chambers while being an easygoing, playful presence. I have enjoyed working with him in two classes, and I recommend him highly.

I first got to know Diego when he enrolled in my 75-person Administrative Law course during the spring of his 1L year. Although I did not get to know him well during that semester, I was impressed by his engaging attitude when I cold called him. He wrote a very strong exam, earning an A- for his consistently good work on questions about justiciability, procedural compliance, judicial review, and constitutionality.

Where I got to know Diego much better is through his work in my much smaller 18-person seminar on Administrative Law and Public Administration. During class discussions, he routinely laid the groundwork for the key points of debate, often taking a provocative position on the assigned reading while finding engaging points of nuance. He and another classmate often had opposing viewpoints on the reading, and the dynamic between the two of them was admirable. They listened to each other and defused what could have been tension with humor and careful listening. The rest of the class typically used these two poles to reason through with each other what they themselves thought about the topic. By the end of the discussion, we had often found a place of agreement buried deep within the seeming contrast. This work suggests to me that Diego would play a constructive role working through briefs and opposing arguments in chambers.

In addition to providing a place to discuss the assigned reading, this seminar is also a writing-intensive course in which students submit three online posts connecting the assigned reading to their developing paper projects and then write a paper of at least six thousand words, meeting with me multiple times over the semester one-on-one to discuss a paper proposal, outline, and draft. Each student also writes a memorandum on one other student's draft paper, providing helpful comments on structure, writing, and analysis.

Diego did a consistently wonderful job on all of these tasks. He wrote a very strong paper on the Environmental Protection Agency's use of Supplemental Environmental Projects as part of the agency's enforcement mission. His writing was engaging and easy to follow, with a well-organized structure and clear analysis. I recommended that he work though one more round of revisions and then submit it for publication as a Note. He also wrote a very helpful memo to another classmate working on an environmental issue, proposing sensible and manageable changes for the classmate to implement in revision. Here, too, this work bodes well for both writing and collaboration as a law clerk.

Diego grew up in Arizona with a strong interest in science and the outdoors. He spent over a decade with a youth outdoor education program, first as a youth participant himself and then ultimately as a board member. He also earned a master's in environmental science at the University of Arizona. The child of two lawyers (Georgetown Law alums themselves who work on criminal defense and habeas in capital cases, respectively), Diego eventually came to see law as the arena in which he would use his scientific and environmental interests to pursue meaningful work. A member of the Georgetown Environmental Law Journal, Diego has interned with the EPA's Office of Civil Enforcement, and he will spend his 2L summer as an intern in the Department of Justice's Environmental and Natural Resources Division. I anticipate that Diego has a future in public service ahead of him. I also anticipate that everyone who works with Diego will find it an enjoyable experience.

I would be happy to discuss Diego's application with you further, so please do not hesitate to reach out. In the meantime, I will reiterate my enthusiastic support for his candidacy.

Very truly yours,

Eloise Pasachoff
Agnes Williams Sesquicentennial Professor of Law

Eloise Pasachoff - eloise.pasachoff@law.georgetown.edu - 202-661-6618

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

It gives me great pleasure to recommend Diego Huerta, who has applied to serve as a law clerk in your chambers. Diego is incredibly smart, highly motivated, and hard-working—a top-notch student and citizen. I believe he would make an excellent law clerk and urge you to interview and hire him.

I got to know Diego over the 2022-2023 academic year, when he was a student in my Statutory Interpretation Theory seminar. The seminar had only 22 students and involved a lot of in-class discussion as well as written student critiques of papers, books, and articles, so I had many opportunities to engage in in-depth discussions with the students. Diego's written comments about the assigned class readings were among the best in the class—thoughtful, inquisitive, and appropriately skeptical at times. Both in his written work and in his in-class comments, Diego displayed an unusual ability to distill the assigned reading down to its most critical core and to synthesize and draw comparisons across different weeks' readings. He also provided valuable insights and commentary about the methodology used for papers that involved empirical analysis. It was a pleasure to have Diego in class—he was always well-prepared and engaged—and added an important perspective to class discussions.

Beyond his excellence in the classroom, Diego is a valued member of the Georgetown Law community. This past year, he served on the Georgetown *Environmental Law Journal*, and he will be its Executive Editor next year. Diego also spent this past fall working at the EPA's Office of Civil Enforcement, while maintaining stellar grades and serving on the *Environmental Law Journal*.

As you may notice from his resume, Diego's background is a little unusual for a law student. He is a scientist, with a degree in environmental science and several years' experience working in labs and performing scientific research. He also has published two articles about pollution exposure in scientific journals. And before law school, he served for several years as a youth mentor for experiential environmental education programs. As his background suggests, Diego is committed to using his law degree to work on environmental issues—and has already made significant headway down this path with his summer positions at EPA and DOJ.

In short, I believe that Diego would make a wonderful law clerk—he is incredibly intelligent, diligent, reliable, and hard-working. If you give him the opportunity, I have no doubt that he will be a valued colleague. He is an excellent student and human being, and I expect that he will have a very successful legal career. I hope that he gets the chance to begin it by working for you.

Thank you for considering this recommendation, and please let me know if I can provide any additional information about Diego that would assist you.

Sincerely,

Anita S. Krishnakumar
Professor of Law and
Anne Fleming Research Professor
anita.krishnakumar@georgetown.edu
(917) 592-4561

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C., 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

June 12, 2023

Re: Clerkship Recommendation for Diego Huerta

Dear Judge:

I am writing to highly recommend Diego Huerta for a clerkship. I was fortunate to be Diego's supervisor throughout his internship in the Air Enforcement Division (AED) of the Environmental Protection Agency during the summer and fall of 2023, and I wholeheartedly attest that his legal skills and acumen and work ethic are stellar. I have worked with at least 75 interns over my 25-year tenure with EPA and Diego easily stands out as one of my top five.

While Diego worked for me at EPA's Air Enforcement Division, he displayed such a high level of competence and integrity that I offered him the unusual opportunity of taking on projects as if he was a staff attorney. One such project involved the development of a novel legal enforcement tool to address a significant nationwide environmental problem. After a thorough review of the assigned matter, including discussions with EPA scientists and the Office of General Counsel, he conducted research to determine a path forward, and developed an approach to allow AED to begin addressing the issue. Then he drafted a detailed memorandum to aid AED in executing the approach after his internship had ended.

Diego also accomplished with excellence a number technically complex assignments for others in my division in high-profile enforcement cases. He was able to jump into a difficult litigation with a refinery and review the evidence and prepare comprehensive evidence charts for four claims. He mastered the underlying law under a tight timeframe and was highly complimented for his work by the Senior Attorney at the Department of Justice in charge of the case. In addition, he drafted a complaint for a complicated vehicle emission certification case, as well as drafted a motion in limine and proposed joint stipulations in an administrative case involving vehicle emission control defeat devices. He also documented violations of the defeat device prohibition by searching through voluminous website sales data and social media accounts. An AED attorney mentoring Diego with the work cited above, Mark Palermo (now Chief of the Vehicle and Engine Branch) indicated:

> He did all of this with precision, gusto, little need for direction, and with incredible speed. He can gain understanding and be ready to complete assignments involving novel legal issues and technically complex case facts

> remarkably fast. He is an excellent writer and has all the requisite skill to be a highly successful attorney. He is not afraid to ask questions and is thoroughly dedicated to do the work necessary to master anything he is asked to accomplish. Finally, he clearly has the passion for environmental law and policy, a sharp intellect, impeccable integrity, and a highly congenial personality. I believe he is going to grow much further in these strengths as he gains experience in the practice of law.

Another attorney Diego worked with, Adrienne Trivedi, praised his work drafting a Clean Air Act judicial referral report to the DOJ on an oil and gas production case that has challenging legal issues. Adrienne indicated:

> Diego did great work. In helping me draft the referral, he was inquisitive, paid careful attention to detail (even identifying a calculation error), eliminated redundancies, ensured consistency with a national model and a related referral already submitted, followed up timely with me throughout the assignment, and was very pleasant to work with.

Finally, one of our top environmental engineers was very pleased to have Diego's invaluable assistance on data management and analysis associated with an extensive inspection of a prominent retailer:

> During the summer of 2022, Diego Huerta played a critical support role in assisting with EPA's inspection of vehicles and engines. Diego created and organized over 50 individual product inspection case files, transcribed hand-written inspection data from the field into a consolidated worksheet, filled in necessary data gaps, and essentially compiled most of the information which turned into the final inspection report. Diego also assisted in compiling publicly available compliance certification information for those vehicles/engines which were found with a label. Diego followed each task instruction well, completed each assignment in a timely fashion, and communicated well by seeking clarification when necessary and in delivery final work products. As a result of Diego's support, EPA was able to uncover over 50,000 claims for suspect uncertified vehicles/engines. I would recommend considering Diego as a sharp new addition to your team.

Diego exhibited remarkable professionalism and efficiency for a law student, as well as produced an enormous quantity of high-quality work given his short time with us. He had a very heavy workload during a very difficult and unprecedented time — transitioning from a global pandemic where many federal employees, such as myself, were working in separate, isolated locations. Yet he was able to complete all his assigned matters with an impressive level of excellence. Diego had the confidence to take the initiative to seek out a varied caseload and readily took on projects involving areas of law for which he had no experience and yet displayed the unusual ability to take command of the subjects. Diego's training in environmental science was also a significant benefit to AED, where engineers and attorneys usually work as a team on cases. As a

key member of one workgroup, Diego researched the central issue of CAA New Source Review applicability. In conducting this research, Diego was not only called upon to analyze statutory and regulatory language, but also delve deeply into technical aspects of applicability. He even discovered a potentially major source of emissions that the technical members of the workgroup had originally discounted. As part of this research, Diego contacted and consulted with persons involved with rulemaking as well as state and industry representatives to complete a comprehensive write up of the rule's operation and implementation. In working with the state, Diego successfully navigated local sunshine regulations. And, as the lead law clerk, he worked with another clerk to develop the anticipated defenses to further what AED expects to be a very politically difficult investigation. I have every confidence that Diego's work will help to navigate the expected difficulties.

Diego is a true team member. For example, when Diego already had a full caseload working for another attorney in AED, he stepped up to take on a last-minute fire drill to aid in the drafting of a rule in conjunction with Office of Air and Radiation. Diego thoroughly researched and wrote an eight-page memorandum on the logical outgrowth test in the context of a proposed rulemaking under the American Innovation and Manufacturing Act. His recommendations were critical in helping to determine the scope of the draft proposed rule.

Diego proved himself to have a sharp intellect, discerning judgment, good humor, meticulous organization, and unparalleled legal research and analytical skills. It was a true pleasure to work with him and I do not hesitate at all to state that he will be a highly valued member of any legal team. I expect a great future for Diego.

Please feel free to contact me if you have any questions: (202) 564-8953.

Sincerely,

Sabrina Argentieri

Sabrina Argentieri, Attorney Advisor
Stationary Source Enforcement Branch
Air Enforcement Division

Deliberate Indifference? The Tenth Circuit's Misguided Views on Farmer

Diego Huerta

dgh46@georgetown.edu | (520) 603-5707

The attached writing sample is an academic article prepared during the Georgetown Law Journal Write On Competition. Research outside the provided cases was prohibited. No edits have been made.

I. Introduction

A. Holding

The Supreme Court has made clear that deliberate indifference on the part of officials to a risk of serious harm to an inmate violates the Eighth Amendment.[1] In *Farmer*, the Court clarified that under the Eighth Amendment, the test for whether a government official was deliberately indifferent to a risk required a showing that an official was subjectively aware of the risk, not just that the behavior was objectively indifferent.[2] While the Eighth Amendment applies only to convicted persons, after *Farmer* lower courts held that the same standard applied to pretrial detainees under the Due Process Clause of the Fourteenth Amendment.[3]

Here, Plaintiff-Appellant sued county officials and medical staff under a theory of deliberate indifference in United States District Court, arguing that under the Supreme Court's holding in *Kingsley v. Hendrickson*,[4] the test for deliberate indifference in the Fourteenth Amendment context was changed from subjective to objective and that they should therefore prevail on their claim of deliberate indifference. The case was dismissed for failure to state a claim and appealed to the United States Tenth Circuit Court of Appeals under the same theory.[5]

The Tenth Circuit distinguished *Kingsley*, reasoning that the subjective component of a deliberate indifference claim was nonetheless required by stare decisis and textual analysis.[6] The court therefore found that the trial court properly dismissed the claims against all officials for failing to allege the subjective component of deliberate indifference.[7]

B. Background

The morning after his booking, pretrial detainee Thomas Pratt told jail officials he was experiencing alcohol withdrawal.[8] A day after that, he was placed on seizure precautions and prescribed medication to treat his symptoms.[9] However at 2:00 a.m. the following day his health was deteriorating.[10] The nurse examining Pratt did not contact a physician as directed by an assessment tool and did not take Pratt's vitals, but merely switched his medication.[11]

When Pratt was assessed by a doctor eight hours later he had a cut on his forehead and blood had pooled on the floor of his cell but the doctor did not provide care. [12] Later, a nurse noted that Pratt needed assistance with daily activities but she and others who evaluated Pratt did not escalate his level of care.[13] At 1:00 a.m. the next day, a detention officer found Pratt lying motionless in his bed.[14] Pratt had suffered a heart attack and was left permanently disabled.[15]

C. Roadmap

While the Tenth Circuit panel was correct that it was bound by its own precedent, it is not bound by Supreme Court precedent and should give serious consideration to the adoption of an objective test for deliberate indifference claims en banc. First, this Comment will argue that the Tenth Circuit was correct that *Kingsley* did not speak clearly to whether their objective test extended to other kinds of claims under the Fourteenth Amendment. Second, this Comment will argue that the Tenth Circuit misread precedents and performed poor analysis to conclude a subjective standard was required, and that *Farmer* does not control the standard for deliberate indifference under the Fourteenth Amendment. Third, this Comment will argue that an objective test has significant advantages over a subjective one and the overruling of the subjective test should be given serious consideration by the Tenth Circuit.

II. Analysis

A. The 10th circuit was correct that Kingsley did not speak clearly to the standard for deliberate indifference claims and was thus constrained by Tenth Circuit precedent.

The language of *Kingsley* does not clearly delineate the kinds of cases in which it is precedential. Consequently, circuit courts have split on whether to apply *Kingsley*'s subjective standard to deliberate indifference claims.[16] Furthermore, circuits differ in the exact kind of test they apply under either standard.[17]

Kingsley's argument from precedent allows but does not require an objective standard beyond the context of excessive force. *Kingsley* used broad language to discuss precedent, but at its heart the opinion simply noted that a prior case allowed a Fourteenth Amendment claim based on objective evidence.[18] Therefore, the Court reasoned, Fourteenth Amendment claims by pretrial detainees do not always require subjective proof of intent to punish, [19] paving the way for their objective test for excessive force claims. However, the fact that claims under the Fourteenth Amendment have been established without a subjective showing does not necessarily lead to the conclusion that such a showing is *never* required, only that it is not required in all cases. Thus, the Tenth circuit was right when it noted that the reasoning of *Kingsley* could be extended to deliberate indifference claims,[20] but such an extension of the subjective standard was not necessitated by *Kingsley*.

Other factors discussed in *Kingsley* do not speak to deliberate indifference claims either. *Kingsley* does include other factors supporting its holding, such as the workability of an objective standard and the existence of other means to protect officers acting in good faith from undue liability under an objective standard.[21] However, the Court's reasoning uses language much more specific to the excessive force context than in the section of their opinion concerning precedent.

The court speaks specifically to "split-second judgments" and "officer training,"[22] considerations that are largely inapplicable to the provision of care by jail medical staff. While a subjective standard in deliberate indifference cases might find support in these considerations generally, it would be a stretch to say that *Kingsley* spoke to the issue specifically.

Thus, though *Kingsley* spoke in broad language in discussion of precedent, it did not clearly speak to the standard for deliberate indifference. In fact, the term does not appear in the Court's opinion.[23] Furthermore, *Farmer* itself clearly distinguished excessive force from deliberate indifference claims.[24] Though other courts have seen fit to reevaluate their own holdings in light of *Kingsley*, the language of *Kingsley* was not definitive as to the test for all deliberate indifference claims. Thus, the Tenth Circuit was necessarily constrained by its own precedent into applying a subjective standard because it could not overrule itself without en banc consideration.[25]

B. *The court incorrectly reasoned that the standard for deliberate indifference should remain subjective based on factors other than stare decisis.*

The court was correct to bind itself to precedent, however the court deployed poor reasoning in its own analysis of the proper test for deliberate indifference.

Though *Farmer* is foundational in defining the test for deliberate indifference, the court should have been more skeptical of reliance on Eighth Amendment precedent. For one, the court distinguishes *Kingsley* because it did not involve medical staff but fails to note that *Farmer* similarly did not involve medical staff. [26] Consistent reasoning would require the court to provide some reason that the distinction between medical staff and detention officers should be instructive in its analysis of *Kingsley* but not *Farmer*.

Further, *Kingsley* casts doubt on the assumption that Eighth and Fourteenth Amendment rights are so closely related. *Kingsley* distinguished Eighth Amendment from Fourteenth Amendment cases because the amendments themselves differed, as did the nature of the claims.[27] *Kingsley* noted that while Eighth Amendment claims were based on what constituted cruel and unusual punishment, "pretrial detainees (unlike convicted prisoners) cannot be punished at all."[28] *Kingsley* therefore took pains to make clear that its ruling did not address the standard for an excessive force claim under the Eighth Amendment.[29] Reliance on Eighth Amendment cases in the Fourteenth Amendment context is thus seriously undercut by *Kingsley*.

The court's analysis of the term "deliberate" was condemned by *Farmer*, a case the court later relies on. The Tenth Circuit analyzed a dictionary definition of "deliberate," concluding that "a deliberate indifference claim presupposes a subjective component."[30] But *Farmer* explicitly rejected the "parsing of the term deliberate indifference" and instead reasoned that "'deliberate,' for example, arguably requires nothing more than an act (or omission) of indifference to a serious risk that is voluntary, not accidental," though ultimately rejecting such an interpretation.[31] The Tenth Circuit's textual analysis of the term deliberate is therefore seriously undercut by *Farmer*'s characterization of the term as a "judicial gloss."[32]

The court's final line of reasoning fails to interpret precedent in context. The court argues that *Farmer* distinguished excessive force claims from deliberate indifference claims because *Farmer* did not "require that an official subjectively intended for force to be excessive."[33] Thus, the court concluded, there is an intent requirement inherent in deliberate indifference claims that is not necessary for excessive force cases like *Kingsley*.[34]

This analysis of *Farmer* gets the point backwards. *Farmer* specifically noted that the test for excessive force claims under the Eighth Amendment required a showing *above and beyond*

deliberate indifference.[35] Thus, *Farmer* positioned the standard for excessive force as stricter than that for deliberate indifference, the inverse of the position the Tenth Circuit takes. Therefore, the court's argument distinguishing the intent requirement between excessive force and deliberate indifference claims finds no support in *Farmer*.

In sum, The court's arguments concerning the relevance of *Farmer* to this question, their textual analysis, and their analysis of *Farmer*'s holding all fail to support their conclusion that the standard for a deliberate indifference claim must be subjective.

C. *In light of Kingsley, the court should take the chance to seriously reevaluate their decision to require a subjective showing in deliberate indifference claims.*

The court should have determined that *Kingsley* and its reasoning permitted an objective standard in Fourteenth Amendment cases. This was the determination made by the Ninth Circuit, who reasoned that *Kingsley*'s language distinguishing Eighth and Fourteenth Amendment claims permitted the application of different standards under each.[36] Thus, thew court could have concluded that only Tenth Circuit precedent, but not *Farmer*, controlled.

Given this, there are good reasons why the Tenth Circuit should take the chance to sit en banc and reevaluate their previous decision to apply a subjective standard. It is important to remember that deliberate indifference is a standard above negligence, providing significant protection to officials.[37] *Kingsley* speaks further about other jurisprudential considerations that protect officers acting in good faith, such as courts' "deference to policies and practices needed to maintain order," and the doctrine of qualified immunity.[38]

Deference towards officials is prevalent throughout cases involving detention. For example, in *Miranda v County of Lake* reasonable reliance on medical personnel ensured that officials were not held liable for the actions of those personnel.[39] Further, when evaluating a

hunger strike policy, the *Miranda* court took notice of the fact that the inmate went longer without food and water than anyone in the jail's history.[40]

Kingsley also notes that an objective standard is easier to administer. In *Caldwell v. Warden FCI Taladega,* the Eleventh Circuit applied a subjective standard to the deliberate indifference claim of a prisoner who, despite telling officers he feared for his life, was put back with a cellmate known to be unstable and violent, who had started a fire in the cell, and who ended up stabbing the prisoner.[41] The court, unable to simply evaluate officers' behavior based on what they had been told, devoted significant analysis to whether a jury could reasonably find that the officers had what amounted to constructive notice, ultimately reversing the lower court.[42] Not only would the case have been simpler from an objective standpoint, it would ultimately have turned on many of the same considerations. Moreover, the fact that this represents an edge case requiring elevation to and reversal by an appeals court does not reflect well on the behavior that judges have *allowed* under the subjective standard.

There are additional reasons for applying a subjective standard to Fourteenth Amendment claims, such as the lack of any state of mind requirement in the underlying right of action,[43] and the fairness of allowing pre-trial detainees to pursue claims under a less strict standard.[44]

III. Conclusion

In *Strain*, the Tenth Circuit correctly ascertained that *Kingsley* did not control the standard for a deliberate indifference claim under the Fourteenth Amendment and ruled in accordance with precedent. However, the court incorrectly determined that under *Farmer* the standard for a deliberate indifference claim should still be objective, while in fact *Farmer* should not be seen to directly control Fourteenth Amendment deliberate indifference claims. Thus, the Tenth Circuit should give serious consideration to overruling its precedent on this issue.

[1] *See* Farmer v. Brennan, 511 U.S. 825, 828 (1994).

[2] *Id.* at 847.

[3] *See e.g.,* Whiting v. Marathon Cnty. Sheriffs Dept., 382 F.3d 700, 703 (2004) ("[T]he legal standard for a § 1983 claim is the same under either the Cruel and Unusual Punishment Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment."); Castro v. Cnty. of L.A., 833 F.3d 1060, 1067 ("[T]he Court had consistently held . . . that the due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner.").

[4] 576 U.S. 389 (2015).

[5] Strain v. Regalado, 977 F.3d 984, 987 (10th Cir. 2020).

[6] *See id.* at 989.

[7] *Id.*

[8] *Id.* at 987.

[9] *Id.* at 987–988.

[10] *Id.* at 988.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Compare Castro*, 833 F.3d at 1070 (applying an objective standard to failure-to-protect claims based on *Kingsley*), *and* Darnell v. Pineiro, 849 F.3d 17, 35 (2nd Cir. 2017) (concluding that after *Kingsley*, deliberate indifference claims no longer required a subjective showing), *with* Dang *ex rel.* Dang v. Sheriff, Seminole Cnty. 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (declining to apply *Kingsley* to a claim of inadequate medical treatment), *and* Whitney v. City of St. Louis 887 F.3d 857, 860 n.4 (8th Cir. 2018) (distinguishing *Kingsley* as an excessive force case). *See generally Strain*, 977 F.3d at 990 n.4.

[17] *Compare Castro*, 833 F.3d at 1071 (applying a four-element objective test for deliberate indifference), *with Darnell*, 849 F.3d at 29, 35 (applying a disjunctive 2-element test allowing objective showings of deliberate indifference). *Compare Dang*, 871 F.3d at 1280 (applying a 3 element subjective test for deliberate indifference), *with Whitney*, 887 F.3d at 860 (applying a 2element subjective test for deliberate indifference).

[18] *See* Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015).

[19] *See id.*

[20] *See Strain,* 977 F.3d at 991 ("[T]he Court did not foreclose the possibility of extending the purely objective standard to new contexts.").

[21] *See Kingsley,* 576 U.S. at 399–400.

[22] *Id.* at 399.

[23] *See id.*

[24] *See* Farmer v. Brennan, 511 U.S. 825, 835 (1994).

[25] *See Strain*, 977 F.3d. at 993 (citing United States v. White, 782 F.3d 1118, 1126–27 (10th Cir. 2015)).

[26] *See id.*, 977 F.3d at 992 n.5.

[27] *See Kingsley*, 576 U.S. at 400.

[28] *Id.*

[29] *Id.* at 402.

[30] *Strain*, 977 F.3d at 992.

[31] Farmer v. Brennan, 511 U.S. 825, 840 (1994).

[32] *Id.* at 840.

[33] *Strain*, 997 F.3d at 992.

[34] *See id.*

[35] *See Farmer*, 511 U.S. at 835 ("The claimant must show that officials applied force "maliciously and sadistically for the very purpose of causing harm.'" (quoting Hudson v. McMillian, 503 U.S. 1, 6 (1992))).

[36] *See* Castro v. Cnty. of L.A., 833 F.3d 1060, 1069 (2017).

[37] *See, e.g.,* Kingsley v. Hendrickson, 576 U.S. 389, 396 (2015).

[38] *Id.* at 399–400.

[39] *See* 900 F.3d 335, 343 (2018).

[40] *See id.* at 344.

[41] 748 F.3d 1090, 1093–1096, 1099 (2014).

[42] *See id.* at 1102.

[43] *See* Castro v. Cnty. of L.A., 833 F.3d 1060, 1069 (2017). (citing Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997)). *See generally* 42 U.S.C. § 1983 (Westlaw through Pub. L. No. 117-102).

[44] *See generally*, Recent Case, Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020)*, 134 HARV. L. REV. 2622 (2021).

Applicant Details

First Name	**Abigail**
Last Name	**Kingsley**
Citizenship Status	**U. S. Citizen**
Email Address	**kingsley2024@lawnet.ucla.edu**
Address	**Address** **Street** **4829 Densmore Ave** **City** **Encino** **State/Territory** **California** **Zip** **91436** **Country** **United States**
Contact Phone Number	**8182574117**

Applicant Education

BA/BS From	**Duke University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of California at Los Angeles (UCLA) Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011**
Date of JD/LLB	**May 15, 2024**
Class Rank	**Not yet ranked**
Law Review/ Journal	**Yes**
Journal(s)	**UCLA Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Park, James
james.park@law.ucla.edu
(310) 825-1744

Emerson, Blake
emerson@law.ucla.edu

Zatz, Noah
Zatz@law.ucla.edu
(310) 206-1674

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Abigail Kingsley

4829 Densmore Avenue, Encino, CA 91436 ▪ (818) 257-4117 ▪ Kingsley2024@lawnet.ucla.edu

June 12, 2023

The Honorable Leslie Abrams Gardner
United States District Court
for the Middle District of Georgia
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Re: Judicial Clerkship Application

Dear Judge Gardner:

I am a rising third-year law student at UCLA School of Law and am writing to apply for a position as a judicial clerk in your chambers for the 2024–2026 term. As a strong believer in public service, I would appreciate the chance to contribute what I have learned, as well as my energy and commitment, to assist in carrying out the duties of the Middle District of Georgia. I would welcome the opportunity to learn from someone uniquely dedicated to public service and justice evidenced in your work as an AUSA and diligence on the federal bench.

Given my academic experience, I believe I would make a meaningful contribution to your chambers as a clerk. While at UCLA School of Law, I have continued to refine my research and writing skills, including as a Research Assistant, wherein I produced memoranda summarizing developments in doctrine and legal scholarship related to the First Amendment and criminal sentencing. I also received specialized legal research training from research librarians at the UCLA Law Library. As a Senior Publishing Editor on the *UCLA Law Review*, I along with one other student edit the entirety of each article prior to publication. In this role, I have strengthened my attention to detail and my ability to thoughtfully and constructively critique legal writing. I have had to pay a close attention to Bluebook, Chicago Manual of Style, and *UCLA Law Review* convention guidelines. In college, my major in Public Policy and minor in Policy Journalism and Media Studies required me to produce compelling reports on quick deadlines. My honors thesis also required extensive research, writing, and analysis.

Through my judicial externship in the chambers of The Honorable Judge Michael W. Fitzgerald at the United States District Court for the Central District of California, I developed skills and knowledge that will enable me to be a successful clerk. In the spring of 2023, I had the opportunity to research and draft orders at many stages of litigation on a wide range of legal matters. Additionally, I observed motions hearings, civil trials, and criminal sentencings, which provided me with invaluable insight into the legal system and the court process. After attending hearings on matters that I worked on, I consulted with Judge Fitzgerald and his clerks to revise the tentative order based on the oral advocacy by the parties. This experience has sharpened my legal research and writing skills, and I am confident that my expertise will be a valuable asset to your chambers. During my Summer Associate position at Cadwalader, Wickersham, & Taft LLP this summer, I will further hone my skills.

In sum, I believe my background will allow me to be a successful clerk in your chambers, and I look forward to the opportunity to further discuss my qualifications and enthusiasm for this position. Enclosed please find copies of my resume, transcript, writing sample, and letters of recommendation from Professors Noah Zatz, Blake Emerson, and James Park for your review. Please do not hesitate to reach out if you have any questions. Thank you for your time and consideration.

Respectfully,

Abigail Kingsley

Abigail Kingsley

4829 Densmore Avenue, Encino, CA 91436 ▪ (818) 257-4117 ▪ Kingsley2024@lawnet.ucla.edu

EDUCATION

UCLA School of Law, Los Angeles, CA
J.D. expected May 2024 | GPA 3.72
Activities: UCLA Law Review, *Senior Publishing Editor Volume 71*
El Centro Labor and Economic Justice Clinic, *Co-Chair* 2022–2023

Duke University, Durham, NC
A.B. *with highest distinction*, Public Policy Studies, May 2021 | GPA 3.83
Minors: Policy Journalism and Media Studies; Political Science
Honors Thesis: *Changes in the California Labor Movement from 2005 to 2019*
Activities: The Muse – A Feminist Magazine, *Co-Founder and Editor in Chief* (2017 – 2021)

EXPERIENCE

Cadwalader, Wickersham, & Taft LLP, New York, NY — May 2023 – Present
Summer Associate

United States District Court for the Central District of California, Los Angeles, CA — Spring 2023
Judicial Extern to the Honorable Michael W. Fitzgerald
Researched and drafted orders and opinions on various legal issues including personal jurisdiction, waiver of defenses, statutory privacy rights, employment law, defamation law, and motions for attorney fees. Observed motions hearings, civil trials, and criminal sentencings. Collaborated with Judge Fitzgerald and supervising clerks to revise tentative orders based on oral advocacy presented at hearings.

Schwartz, Steinsapir, Dohrmann & Sommers, Los Angeles, CA — Fall 2022
Legal Clerk
Produced draft of an unfair labor practice charge filed with California's Public Employee Relations Board. Researched and wrote memoranda on legal challenges to workers' collective bargaining rights.

UCLA School of Law, Los Angeles, CA — May 2022 – July 2022
Research Assistant to Professor Noah Zatz
Researched and drafted memorandum analyzing whether First Amendment guarantees right to learn about race in public schools. Compiled up-to-date case list on doctrinal lines related to court-ordered community service. Received training in cost-effective research techniques, including Boolean searching for cases, statutes, and legislative histories in Lexis, Westlaw, and other databases.

Duke University, Durham, NC — January 2021 – May 2021
Research Assistant to Professor Matthew Johnson
Completed comprehensive review of economics papers studying declining union density and elections.

Senator Catherine Cortez Masto's DC Office, Washington, D.C. — June 2020 – August 2020
Policy Intern
Analyzed upcoming health legislation and advocated policy positions. Attended stakeholder meetings and drafted constituent communications.

UNITE HERE Local 11 UI Project, Los Angeles, CA — May 2020 – August 2020
Volunteer
Assisted union members with filing unemployment insurance claims and aided with appeal process to correct unjustified denial of benefits.

Capital & Main, Los Angeles, CA — Summers 2017 and 2019
Intern
Produced comprehensive timeline on the policy origins of income inequality and co-wrote a column on local, state, and national education issues.

INTERESTS

DIY craft projects | Cooking | Exploring restaurants, flea markets, thrift stores, and events.

University of California, Los Angeles
LAW Student Copy Transcript Report

Student Information

Name:	KINGSLEY, ABBY
UCLA ID:	304708219
Date of Birth:	01/26/XXXX
Version:	08/2014 | SAITONE
Generation Date:	June 09, 2023 | 03:48:20 PM
	This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/23/2021

SCHOOL OF LAW

Major:
LAW

Degrees | Certificates Awarded

None Awarded

Graduate Degree Progress

SAW COMPLETED IN LAW 312, 22F

Previous Degrees

None Reported

California Residence Status

Resident

Fall Semester 2021

Major:
LAW

INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P
LAWYERING SKILLS	LAW 108A	2.0	0.0	IP
Multiple Term - In Progress				
PROPERTY	LAW 130	4.0	13.2	B+
TORTS	LAW 140	4.0	16.0	A
CIVIL PROCEDURE	LAW 145	4.0	16.0	A

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	45.2	3.767

Spring Semester 2022

CONTRACTS	LAW 100	4.0	14.8	A-
LGL RSRCH & WRITING	LAW 108B	5.0	16.5	B+
End of Multiple Term Course				
CRIMINAL LAW	LAW 120	4.0	14.8	A-
CONSTITUT LAW I	LAW 148	4.0	13.2	B+
LW & ECON INEQUALTY	LAW 165	1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	18.0	18.0	59.3	3.488

Fall Semester 2022

EVIDENCE	LAW 211	4.0	16.0	A
ENTERTAINMENT LAW	LAW 305	3.0	11.1	A-
PROFESSIONAL RESPON	LAW 312	2.0	7.4	A-
PROB SOLV PUB INT	LAW 541	3.0	12.0	A
PRETRIAL CIVIL LIT	LAW 700	4.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	46.5	3.875

Spring Semester 2023

SPORTS LAW SIMULATN	LAW 768	5.0	20.0	A
PART-TIME EXTERNSHP	LAW 801	6.0	0.0	P
EXTN SEMINAR: JUDGE	LAW 806	1.0	0.0	P
CIVIL PRO IN PRACTC	LAW 954	1.0	4.0	A

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	24.0	4.000

LAW Totals

	Atm	Psd	Pts	GPA
Pass/Unsatisfactory Total	13.0	13.0	N/a	N/a
Graded Total	47.0	47.0	N/a	N/a
Cumulative Total	60.0	60.0	175.0	3.723

Total Completed Units 60.0

Memorandum

Masin Family Academic Gold Award
CIVIL PRO IN PRACTC, s. 1, 23S

END OF RECORD
NO ENTRIES BELOW THIS LINE

UCLA School of Law

JAMES PARK
PROFESSOR OF LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 825-1744
Email: James.Park@law.ucla.edu

May 31, 2023

Dear Judge:

I am writing this letter on behalf of Abigail Kingsley, who is applying for a clerkship in your chambers. Abby is a student who combines a passion for worker rights with strong skills in legal writing and analysis. She will be an excellent law clerk.

I first got to know Abby when she was a student in my civil procedure class during the fall of 2021. This was our first year back in the physical classroom after a year of classes on Zoom. The class was a large one and everyone was required to wear a mask. Abby was a strong participant in the class. It was evident to me that she worked very hard throughout the semester and had exceptional focus.

We were able to have small group lunches outdoors and I took most of the students out to lunch in groups of 4 to 5 students. I had lunch early on in the semester with Abby and was impressed by her strong interest in labor law. I am a scholar of corporate and securities law and we spoke at length about a variety of issues at the intersection of corporate purpose and worker rights. A week or two later she followed up by sending me a copy of a report on shareholder buybacks.

I was not surprised that Abby wrote one of the best final exams in the class. She was in the top 5 students in a class of 80 and received an A for her efforts. She particularly shone in her ability to incorporate the relevant facts in the exam hypothetical to make her points. I am confident that she has superior writing and analytical abilities. She also knows federal civil procedure very well.

Abby would be a great addition to your chambers. She is popular with her peers and would be a great colleague.

I hope that you have the time to interview Abby and that you hire her. Please let me know if you have any questions about her application.

Sincerely,

James Park
Professor of Law

UCLA School of Law

BLAKE EMERSON
PROFESSOR OF LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 825-4895
Email: emerson@law.ucla.edu

May 11, 2023

Dear Judge:

I am writing to enthusiastically and unreservedly recommend Abigail Kingsley for a clerkship in your chambers. I taught Abby during her 1L year in torts, where she earned an A in the course, placing her within the top 20 percent of the class. My torts class aims to teach students not only the black letter rules of personal injury law but also the principles and policies underlying those rules, such as the protection of individual liberty and the promotion of social efficiency. Abby excelled at both, both in class discussion and on her exam. To probe students' understanding of the purposes behind the rules of tort law, my exam asked students to identify one rule of tort law they would change and explain why, relying on the case law we had read. Abby offered an excellent argument that mental disability should be treated differently than physical disability in negligence law, stating that it instead should compare the conduct of mentally disabled person to a reasonable person with a like disability. She brilliantly explained how the existing rule fails to promote social welfare and undermines the autonomy interests of people who suffer from mental health difficulties. The clarity of her argument and the quality of her writing shone through under significant time pressure. I am sure that these skills would serve her well as a law clerk.

Abby's experience at law school has prepared her quite well for a clerkship. She has served as a judicial extern for Judge Michael W. Fitzgerald on the United States District Court for the Central District of California, where she drafted order and opinions. She has served as a publishing editor for the *UCLA Law Review*, conducted legal research on the first amendment in public schools, and served as a clerk at a labor and employment law firm. She is Co-Chair of the El Centro Labor and Economic Justice Clinic, which is a student-coordinated legal aid project.

Abby has thus made great use of her time during law school both to hone her skills and to serve the public, with a special focus on issues relating to labor rights. In our conversations, she has expressed interest in a career in public service, in particular, by working for government agencies such as the National Labor Relations Board or the Federal Trade Commission.

Abby is a pleasure to work with and to teach. She is invariably engaged, professional, and produces very high-quality work. She would make great contributions to your chambers. Please let me know if I can answer any further questions about Abby.

Sincerely,

Blake Emerson
Professor of Law

UCLA School of Law

NOAH D. ZATZ
PROFESSOR OF LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-1674
Email: zatz@law.ucla.edu

June 5, 2023

Dear Judge:

I strongly recommend **Abigail Kingsley** for a clerkship in your chambers. Abby did outstanding work for me as a research assistant during summer 2022. She excelled in a wide range of research and writing tasks, and she demonstrated strong skills at levels of both technical detail and broader conceptualization.

At one end of the spectrum, I asked Abby to review the results of a 50-state survey of state statutes regulating court-ordered community service in criminal cases. Her principal task was to update a summary document in light of intervening changes in state law that a previous RA had compiled. In the course of it, however, Abby noticed, understood, and brought to my attention some omissions from the initial coding of the survey, as well as some ambiguities about how certain recurring types of provisions ought to be categorized. Abby demonstrated both exceptional attention to detail (carefully parsing statutory text) and, as importantly, the ability not to get lost in those details but instead to keep in mind the overarching purpose of the task and thus to understand the significance of points that I had not specifically asked her to address.

At the other end of the spectrum, I asked Abby to perform a secondary literature survey on legal theories of the relationship between the First Amendment and constitutional commitments to democracy. The context was a nascent project to explore how the First Amendment should be read in light of constitutional commitments to racial equality that partly constitute the broader democratic project, a question raised sharply by recent legislation to suppress teaching about racial inequality. This was an open-ended and somewhat abstract task, and Abby performed it splendidly. Not only did she identify a wide range of relevant scholarship, but she did an exceptional job both of synthesizing and organizing her findings into a clear and compelling schema and of distinguishing between more and less relevant materials.

Falling somewhere in the middle was a project to review extant labor law casebooks for materials that explicitly engage connections between labor law and racial justice, as well as to do a secondary literature search for the same. This was to help me prepare for teaching our Labor Law course for the first time. Again, Abby did outstanding work, at once careful and thorough while also analytically sharp and demonstrating excellent judgment. She was very perceptive about the different ways that authors framed the relationship between labor law and race, supplementing them with her own observations from reading some of the underlying cases herself.

Abby was also a pleasure to work with. She was well-organized, communicated clearly, and always thoughtful. Abby has well-developed professional interests at the intersection of labor law and entertainment law, and I was impressed by how perceptive and well-researched her career plans are. I

think she will go far. In the meantime, she has a suite of qualities that make me confident that she would be an excellent law clerk.

Please do not hesitate to contact me if I can elaborate on anything or answer whatever questions you might have about Abby Kingsley.

Sincerely,

Noah Zatz

Abigail Kingsley

4829 Densmore Avenue, Encino, CA 91436 ▪ (818) 257-4117 ▪ Kingsley2024@lawnet.ucla.edu

Writing Sample

This writing sample is a bench memorandum written during my externship with Judge Michael W. Fitzgerald regarding a Motion to Dismiss. The memorandum reflects my independent research and analysis, and is my original and unedited work product.

In accordance with Judge Fitzgerald's procedures, I have omitted case-identifying information and have not referred to individuals by their legal names.

BENCH MEMORANDUM

To: Judge Fitzgerald
From: Abigail Kingsley
Re: Recommendation on Order re: Motion to Dismiss

Before the Court is Defendant's Motion to Dismiss the First Amended Complaint ("FAC") for failure to state a claim under Federal Rule of Procedure 12(b)(6), filed on [redacted]. Plaintiffs filed an Opposition on [redacted]. Defendant filed its Reply on [redacted].

Statement of the Issues

This action commenced on [redacted] when Plaintiffs filed their complaint for violations of section 631(a) and section 632.7 of the California Individual Privacy Act ("CIPA"). Plaintiffs in their two causes of action allege Defendant, an online retailer, improperly eavesdropped on and recorded conversations between visitors and Defendant on Defendant's website chat feature.

Defendant has filed this Motion on the grounds that Plaintiffs fail to state a claim and moves to dismiss under Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs present a novel issue of California law to this Court to determine if the first and second clauses of section 631(a) and section 632.7 of CIPA apply to online chat conversations on retailers' websites.

Short Answers

I recommend that this Motion be **GRANTED** and Plaintiffs' action be **DISMISSED *with leave to amend in part*** and **DISMISSED *without leave to amend in part***.

In their first cause of action, Plaintiffs allege violations of the first and second clauses of section 631(a). The first clause of section 631(a) prohibits wiretapping of phone conversations. The case law does not support Plaintiffs' contention that this clause also applies to internet communications. Because Plaintiffs only plead communication with Defendant on its internet chat function, the first clause does not apply and the claim should fail. Amendment would be futile as Plaintiffs cannot plausibly plead they communicated with Defendant on its internet chat function using telephone technology.

The second clause of section 631(a) bars eavesdropping on conversations. The case law supports application to internet communications like online chats. However, Defendant makes three arguments why Plaintiffs' pleadings are insufficient. Defendant argues that: (1) liability does not attach where a plaintiff consented to recording; (2) Defendant and the third-party software company were parties to the conversation raising a party exemption; and (3) Plaintiffs fail to show the messages were intercepted "in transit" as required under the second clause.

Defendant accurately states the case law, but only its second and third arguments have merit. First, the Court should find Plaintiffs did not consent to recording as the plain statement in their pleading is sufficient at this stage. Second, the Court, based on the relevant case law, should find that the Defendant, as a party to the chat conversation, and the third party are ***both*** entitled to the party exemption due to their commercial relationship and the limited use of the data obtained. Third, I recommend the Court determine that Plaintiffs fail to show the messages were intercepted in transit because recording conversations on one end (or at its completion through transcription as Plaintiffs allege) does not meet the in transit standard. Plaintiffs have not met their pleading burden for their first cause of action under the first and second clauses of section 631(a), however, there exists a plausible set of facts that Plaintiffs could provide under the second clause of section 631(a). I recommend the Court grant Defendant's Motion as to the first cause of action and allow Plaintiffs leave to amend.

In their second cause of action, Plaintiffs make a claim for privacy violations under section 632.7 which prohibits interception and recording of communications between a cellular radio telephone and a cordless telephone on one end, and a cellular radio telephone, a cordless telephone, and a landline phone on the other. Plaintiffs fail to meet this standard as communication between Plaintiffs' smartphone or laptop with Defendant's ***internet*** chat function does not and cannot fall within this limited statutory protection. Defendant's Motion should be granted without leave to amend as amendment would prove futile.

I. BACKGROUND

To provide context on this dispute, I have briefly summarized the most relevant facts in this action. For the sake of brevity and readability, record citations have been omitted.

Plaintiff [redacted], on behalf of himself and a putative statewide class, commenced this action on [redacted] for violations of section 631(a) of CIPA. Plaintiffs then filed an amended complaint on [redacted] alleging that Defendant illegally wiretaps conversations on its website at [redacted] (the "Website"). (FAC (Docket No. [redacted]) at 1).

Plaintiffs had brief conversations with Defendant using the chat function on the Website about Defendant's services and policies. Plaintiffs allege that Defendant utilized third-party software to "[intercept] and eavesdrop on…communications in real time…to harvest data from those conversations for financial gain." Plaintiffs claim that Defendant paid the third-party company substantial sums to embed code into the Website chat function, create transcripts of the conversations, and analyze the conversations for Defendant's benefit. Plaintiffs allege that Defendant had no disclaimer or notice of its intent to record and Plaintiffs did not consent to any recording of their conversations.

Plaintiffs visited the Website using "either a smart phone (a cellular telephone with an integrated computer and an operating system that enables web browsing) or a wifi-enabled laptop that uses a combination of cellular and landline telephony to communicate." Plaintiffs pleaded that their telephones and laptops utilize "cellular towers, computer servers, and other

electronic equipment comprised of "wire[s], line[s], cable[s], or instrument[s]" to transmit both voice calls and computer data to their intended recipients."

II. DISCUSSION

A. Plaintiffs fail to plead a viable claim under the first clause of section 631(a)

Plaintiffs fail to sustain a claim under the first clause of section 631(a). Cal. Penal Code § 631 (West 2020). This clause reads "any person who…taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system…is punishable." *Id.*

Courts have consistently interpreted this clause as applying only to communications between telephones and not through the internet. *Williams v. What If Holdings, LLC*, 2022 WL 17869275, at *2 (N.D. Cal. Dec. 22, 2022) (determining "the first clause of Section 631(a) concerns telephonic wiretapping specifically, which does not apply to the context of the internet"); *In re Google Assistant Priv. Litig*., 457 F. Supp. 3d 797, 825–26 (N.D. Cal. 2020) (reasoning that the clause "expressly requires that the unauthorized connection be made with any telegraph or telephone wire, line, cable, or instrument.") (internal quotations omitted).

Plaintiffs cite *In re Google Inc.*, 2013 WL 5423918, at *21 (N.D. Cal. Sept. 26, 2013) to stand for the proposition that the first clause of section 631(a) applies to communications over the internet due to "California courts' approach [of] updating obsolete statutes in light of emerging technologies." Plaintiffs urge this Court to broadly interpret the first clause of section 631(a) as applying to communications on the internet between smart phones and wifi-enabled laptops. (FAC ¶ 21).

But this argument has been uniformly rejected by numerous courts as well as in *In re Google* itself. The court in *In re Google* analyzed the application of the ***second clause*** of section 631(a) to email and did determine the second clause applied to new communication technologies. However, the court did so by comparing the absence of limiting language in the second clause to the inclusion of limiting language in the first clause. The court found that this construction meant the California "Legislature intended the two clauses to apply to different types of communications." Other courts have similarly interpreted the first clause as applying solely to telephonic communications. *See Mastel v. Miniclip SA,* 549 F. Supp. 3d 1129, 1135 (E.D. Cal. 2021) ("The court will therefore follow the overwhelming weight of authority requiring a plaintiff to plausibly allege that a defendant intentionally tapped or made an unauthorized connection with a telegraph or telephone wire, line, cable, or instrument to state a claim under [section] 631(a)'s first clause.") (internal quotations omitted); *Matera v. Google Inc.*, 2016 WL 8200619, at *18 (N.D. Cal. Aug. 12, 2016) (affirming interpretation of the first clause to solely telephonic communication); *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d at 825–26; *Williams v. What If Holdings, LLC*, 2022 WL 17869275, at *2 (N.D. Cal. Dec. 22, 2022). Here, the Court should similarly determine that the first clause of section 631(a) does not apply to communications over the internet.

Plaintiffs additionally contend that even if the first clause does not apply to internet communications, a smart phone falls within the definition of telephone because it utilizes "cellular towers, computer servers, and other electronic equipment comprised of "wire[s], line[s], cable[s], or instrument[s]" to transmit both voice calls and computer data to their intended recipients." (FAC ¶ 21). A similar argument around the definition of an iPhone being a phone was rejected in *Mastel*. *Mastel,* 549 F. Supp. 3d at 1135. In *Mastel*, the court determined that "[a]lthough iPhones contain the word "phone" in their name, and have the capability of performing telephonic functions, they are, in reality, small computers." *Id.* Here, the Court should similarly decline to interpret the first clause as applying to smart phones which are wireless despite utilizing communication technologies which then are comprised of "wire[s], line[s], cable[s], or instrument[s]."

Plain interpretation and case law dictate that this interpretation is not consistent with the language of the first clause describing "***telephone*** wires, lines, or cables" which refers to specific technology. Cal. Penal Code § 631 (West 2020) (emphasis added); *Herrera v. Zumiez, Inc.*, 953 F.3d 1063, 1071 (9th Cir. 2020) (California law of statutory interpretation "begins with the words themselves… because the words generally provide the most reliable indicator of [legislative] intent").

This Court should find unpersuasive Plaintiffs' additional assertion that the California Legislature's failure to clarify that section 631(a) ***only*** applies to landline telephones supports an inference of "acquiescence in a broad interpretation of the "telephone" term" to include smart phones and wifi-enabled devices. (Motion at 20). Again, their own citation, *In re Google Inc.*, refutes this interpretation which found the construction of the first clause in a ***limited*** manner was intentional due to the absence of limiting language in the second clause. *In re Google Inc.*, 2013 WL 5423918, at *20.

Further, there has been no such acquiescence. The limiting language demonstrated the Legislature's intent and California law dictates statutory interpretation "begin with the words themselves." *See Herrera*, 953 F.3d at 1071. The fact that the Legislature has had an opportunity to amend section 631(a) to consider privacy issues raised by new technologies like internet messaging is indicative of its intent not to expand protections. *See Smith v. LoanMe, Inc.*, 11 Cal. 5th 183, 191 (2021) (finding the Legislature's intent was evidenced through their amendments in 1985, 1990, and 1992 to the CIPA statute "to take account of privacy issues raised by the increased use of cellular and cordless telephones").

Here, the Legislature amended CIPA many times since it was enacted and has not defined section 631 to apply to internet communications. Cal. Penal Code §§ 632 (amended 2016), 633 (amended 2018), 633.5 (amended 2017), 633.6 (same), 633.8 (amended 2011), 636 (same), 637 (same), 637.2 (amended 2016) (West 2022). The Legislature amended section 631 itself in 1988, 1992, 2011 and 2022. Cal. Penal Code § 631 (West 2023) (amended 2022, eff. Jan. 1, 2023). The Legislature did not add protections for internet communications to the first clause of 631(a) in either 2011 or 2022 when the technology was widely known and used. This Court should reject Plaintiffs' argument that the term "telephone" should be interpreted broadly to include internet technologies due to the Legislature's failure to clarify it intended a narrow definition despite having decades to do so. Courts have consistently favored a narrow reading of the first

clause which the Legislature could have rejected through clarifying amendment. Plaintiffs are incorrect that the Legislature is required to define terms specifically to exclude the inclusion of new technologies as time passes. The Legislature's narrow construction of the statute is evidence of its intent. This Court should decline to expand protections and usurp the Legislature based on Plaintiffs' speculation.

Because the Court should make determinations that the first clause of section 631(a) does not apply to communications with a smart phone or wifi-enabled laptop, it need not address the issues of consent or direct party exemption in relation to the first clause of section 631(a).

B. Plaintiffs fail to plead a viable claim under the second clause of section 631(a)

a. Consent arguments

For purposes of Rule 12(b)(6), Plaintiffs have sufficiently pled that they did not consent to recording of their conversations with Defendant. *See Yoon v. Lululemon USA, Inc.,* 549 F. Supp. 3d 1073 (C.D. Cal. 2021) (finding that plaintiff's pleading that stated she did not consent to recording was sufficiently pled to overcome a 12(b)(6) motion); *Javier v. Assurance IQ, LLC,* 2022 WL 1744107 (9th Cir. May 31, 2022) (finding that the plaintiff met his pleading burden where he alleged he did not give express prior consent).

b. Party exemption arguments

The parties dispute whether there is a party exemption under the second clause of section 631(a) which precludes liability for defendants who engage in "eavesdropping" conduct. However, California law is well settled that a party to the communication is not liable for recording their own conversation under section 631(a), however, a party may be held ***vicariously liable*** under the fourth clause of this section where it "aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things" prohibited in the prior three clauses. Cal. Penal Code § 631 (West 2020).

In *Rogers v. Ulrich*, 52 Cal. App. 3d 894, 897 (1975), the defendant used a tape-recording device to record a conversation with the plaintiff without the plaintiff's knowledge or consent. The California Court of Appeal found that the second clause of section 631(a) does not apply to participant recording. In looking at the Legislature's intent in passing CIPA, the court notes "it speaks of preventing eavesdropping and other invasions of privacy, thus suggesting that participant recording was not meant to be included." *Id.* at 899. The court continued, "it is never a secret to one party to a conversation that the other party is listening to the conversation; only a third-party can listen secretly to a private conversation." *Id.*

Federal courts have routinely affirmed the holding in *Rogers* that a party cannot eavesdrop on its own conversation. *Saleh v. Nike*, 562 F. Supp. 3d 503, 516 (C.D. Cal. 2021) ("Section 631(a) contains an exemption from liability for a person who is a "party" to a communication, where a party to a communication cannot be held to wiretap another party to the same communication"); *Javier v. Assurance IQ, LLC*, 2023 WL 114225, at *4 (N.D. Cal. Jan. 5, 2023) (affirming that a party to a conversation cannot be held liable as an eavesdropper);

Graham v. Noom, 533 F. Supp. 3d 823, 831 (N.D. Cal. 2021) ("a party to a communication can record it (and is not eavesdropping when it does)"); *Revitch v. New Moosejaw, LLC*, WL 5485330, at *2 (N.D. Cal. Oct. 23, 2019) (noting that a defendant would not have violated section 631 if it had made a transcript of the conversation with plaintiff and then transmitted a copy to a third party because "sharing a record is not eavesdropping"); *Williams v. What If Holdings, LLC*, 2022 WL 17869275, at *2 (N.D. Cal. Dec. 22, 2022) ("Parties to a conversation cannot eavesdrop on their own conversation.…[defendant]'s liability is therefore based entirely on whether [the third party] violated Section 631(a)").

It is undisputed that Defendant was a party to the conversation with Plaintiffs and, as such, cannot be held liable under the second clause of section 631(a), however, Defendant can be held vicariously liable under the fourth clause if it assisted a third party in violating the second clause of section 631(a). *Id.*

This Court should consider the "party exemption…in the technical context of this case." *See In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 607 (9th Cir. 2020). While technology has developed over the years, the basic inquiry remains the same. In *Rogers v. Ulrich*, the party to the conversation who used a tape recorder to record the conversation did not violate section 631(a) under the party exemption. Whereas, in *Ribas v. Clark*, 38 Cal. 3d 355, 362 (1985), a defendant wife allowed her friend to listen in on a conversation with herself and her husband; the court found the friend's actions were prohibited by CIPA which raised liability for the defendant wife. The court continued "a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or mechanical device." *Id.* at 360–61.

Following the *Rogers* and *Ribas* distinction, Federal and California courts have analyzed whether the technology (or actor) behaves more akin to a tape recorder utilized by the party to the conversation or as an eavesdropper "press[ing] up against a door to listen to a conversation." *Revitch,* 2019 WL 5485330, at *2. In the software context, the court in *Javier v. Assurance IQ* wrote "whether software providers…are third parties under California's eavesdropping statute, or mere tools used by websites, goes to the heart of the privacy concerns articulated in [s]ection 631 and California cases interpreting it." *Javier*, 2023 WL 114225, at *4.

Here, Plaintiffs claim Defendant utilized third-party software to "[intercept] and eavesdrop on such communications in real time in order to harvest data from those conversations for financial gain." (FAC at 1). Plaintiffs also assert that "Defendant…pays third parties to ***eavesdrop*** on the conversations" and then "Defendant and third parties then harvest data from the transcripts for financial gain." (FAC ¶ 9) (emphasis in original). Plaintiffs allege "[t]o enable the eavesdropping, Defendant has paid substantial sums to at least one third-party company to embed code into Defendant's website chat function that enables the third party to secretly intercept in real time, eavesdrop upon, and store transcripts of Defendant's chat communications with unsuspecting website visitors." (FAC ¶ 11). Plaintiffs also claim that the "third party publicly boasts of its ability to harvest valuable data from such communications for the benefit of its clients like Defendant, which is one of the reasons that Defendant enabled, aided, abetted, conspired with, and paid it substantial funds for [its] eavesdropping services." (FAC ¶ 12).

The present software which "intercept[s] in real time…and store[s] transcripts" is more akin to a tape recorder like the one used in *Rogers*. The court in *Williams* determined the plaintiff's limited allegations which "allege[] that defendant deployed [third party]'s…recording software only on [defendant]'s websites and that the recordings were stored and accessed on [third party]'s servers" showed the third party acted like the tape recorder and as such, was entitled to the party exemption. *Williams*, 2022 WL 17869275 at *3. The court found it determinative that there were no facts alleging independent use by the third party and that the "recordation is routine documentation and therefore clerical in nature which is qualitatively different than data mining." *Id.*

The use here "intercept[ing] and eavesdrop[ing] on such communications in real time in order to harvest data from those conversations for financial gain" appears to conflate two separate issues. First, there is the allegation of what the third party does ***during*** the conversation and second, what the third party does with the recorded transcripts ***after*** the conversation. During the conversation, when the third party was purportedly recording and storing the transcript, the third party appears to be operating like a tape recorder. When a party captures and stores data, courts have routinely found that they operate like an extension of the defendant (i.e. a tape recorder). *Williams*, 2022 WL 17869275 at *4 ("the fact that [defendant] used software rather than a physical recording device for the same function does not mean that it aided and abetted wiretapping"); *Graham v. Noom, Inc.*, 533 F. Supp. 3d at 833 (determining a third-party software company was not liable where it captured and stored its client's information).

After the conversation, Plaintiffs allege the "third party publicly boasts of its ability to harvest valuable data from such communications ***for the benefit of its clients,***" and "[d]efendant ***and*** third parties then harvest data…for financial gain." (FAC ¶ 9, 12) (emphasis added). The use of the data by the third party does not appear to be independent. The pleadings taken as true at this stage, nowhere, suggests that the third party has the ability to use the information independently and only pleads that the third party analyzed or used the data on behalf of or in tangent with Defendant. The unnamed third party operates in tandem with or for the benefit of Defendant. This is materially different than the defendants in *In re Facebook, Inc.* and *Revitch* where the third party captured data and then used the data for its own benefit by reselling the aggregated data. *See In re Facebook,* 956 F.3d at 601; *Revitch,* 2019 WL 5485330, at *2; *Graham v. Noom, Inc.*, 533 F. Supp. 3d at 833 ("unlike NaviStone's and Facebook's aggregation of data for resale, there are no allegations here that [the third party] intercepted and used the data itself."). Because in Plaintiffs' allegations the third party is more similar to the software provider in *Graham* than in *In re Facebook* or *Revitch*, this Court should determine *Graham* to hold more persuasive value.

I recommend this Court determine Plaintiffs fail to plead that the third party acted sufficiently independently from Defendant as to constitute an unannounced auditor under California law. Defendant has sufficiently shown it is entitled to a party exemption and its Motion should be granted as to this claim.

c. Interception arguments

The case law shows that the second clause of section 631(a) requires messages be intercepted while in transit. *See Mastel,* 549 F. Supp. 3d at 1135 ("the second clause only imputes liability when the defendant reads, or attempts to read, a communication that is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within California") (internal quotations omitted) (emphasis in original). Because the Wiretap Act, like CIPA, also requires messages be intercepted while in transit, courts have looked at cases analyzing the Wiretap Act as informative of section 631(a). *See Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 876 (9th Cir. 2002) (interpreting the in transit language of the Wiretap Act as requiring interception during the communication's transmission and not during electronic storage); *NovelPoster v. Javitch Canfield Grp.*, 140 F. Supp. 3d 938, 954 (N.D. Cal. 2014) (applying *Konop*'s analysis of the Wiretap Act to a CIPA claim). Cases in the Ninth Circuit have interpreted the in transit requirement narrowly. *See Bunnell v. Motion Picture Ass'n of Am.*, 567 F. Supp. 2d 1148, 1152 (C.D. Cal. 2007) ("Even if the storage phase is transitory and lasts only a few seconds, it is still considered electronic storage").

Plaintiffs urge this Court to follow *Campbell v. Facebook Inc.*, 77 F. Supp. 3d 836, 848 (N.D. Cal. 2014), which they quote for the proposition that "the complaint's allegation that users' messages were intercepted in transit is to be taken as true at this stage of the case." In *Campbell*, the plaintiffs alleged facts surrounding the interception far greater than in this case. *Id*. at 839 ("[plaintiffs] allege that Facebook scans the content of their private messages, and if there is a link to a web page contained in that message, Facebook treats it as a "like" of the page, and increases the page's "like" counter by one"). This allegation contains sufficient detail to put a defendant on notice, whereas, Plaintiffs' allegations that "the third party…secretly intercept[s] in real time, eavesdrop[s] upon, and store[s] transcripts" is conclusory and does not allege specific facts as to how or when the interception takes place which has been found to fall short of stating a plausible claim under section 631(a).

Plaintiffs' pleadings are conclusory regarding intercepting messages in transit. Courts have found these types of conclusory statements do not meet pleading standard under section 631(a). *Rosenow v. Facebook, Inc.*, 2020 WL 1984062 (S.D. Cal. Apr. 27, 2020) (dismissing plaintiffs' Wiretap Act claims for failing to allege sufficient facts about interception). Plaintiffs argue *Rosenow* is distinguishable on the grounds that in the pleadings, the plaintiffs "made a judicial admission" which suggested the communications were accessed in storage. I recommend this Court should disagree with the Plaintiffs' argument. The plaintiff in *Rosenow* alleged "[defendant] knowingly used an algorithm to intercept and scan [p]laintiff's incoming chat messages for content during transit and before placing them in electronic storage." *Id.* at *7. The allegation in *Rosenow* contained greater detail about the purported interception than Plaintiffs in this case. And still, the *Rosenow* court held that "[plaintiff] fails to allege facts that support an inference that [defendant] 'captured or redirected' the contents of [plaintiff]'s communications while in transit." *Id.*

Similarly, in *Rodriguez v. Google LLC*, 2022 WL 214552 at *1 (N.D. Cal. Jan. 25, 2022), the court found that the plaintiffs failed to allege sufficient facts where "[p]laintiffs reference an 'open line of communication,' and 'real-time ad bidding' in support of [their] theory, but neither

describes how Google actually intercepts data in real time." The court found that "using the word 'intercept' repeatedly is simply not enough without the addition of specific facts that make it plausible [defendant] is intercepting their data in transit." Plaintiffs do not allege specific facts about the unnamed third party's purported interception. Plaintiffs write, "Defendant…automatically records and creates transcripts of all such private conversations." (FAC ¶ 11). Recording and creating transcripts is not the same as a specific allegation that the message is intercepted while in transit. The timeline of the automatic recording and transcription is unclear as it could occur during transit or it can take place after receipt of the message in Defendant's inbox. Plaintiffs do not sufficiently allege how the messages were intercepted to provide notice for Defendant. *In re Vizio, Inc., Consumer Priv. Litig.,* 238 F. Supp. 3d 1204 (C.D. Cal. 2017) ("While [p]laintiffs need not prove their theory of interception on a motion to dismiss, [p]laintiffs must provide fair notice to [d]efendants of when they believe [defendant] intercepts their communication. A written explanation of [p]laintiffs' theory is…important"). Here, Plaintiffs do not allege sufficient facts as to how and when the third party receives the communications. Plaintiffs must provide more than conclusory allegations that messages were "intercepted in real time."

Plaintiffs bring up multiple "Session Replay" cases as analogous to their pleading and as support for their interception argument, however, Plaintiffs do not plead that their interactions with Defendant used "Session Replay" technology, only that there was code that allowed interception, eavesdropping, and transcribing. "Session Replay" technology "embeds snippets of code that watch and record, in real time, 'a visitor's every move on a website.'" *Saleh v. Nike*, 562 F. Supp. 3d 503, 509 (C.D. Cal. 2021). "Session Replay" technology goes beyond monitoring of conversations and creating "transcripts" and instead collects and records all interactions with a website. Plaintiffs' pleadings do not allege this type or level of data collection and instead focus on "conversation," "transcript," and "communication" with Defendant's chat feature. (FAC ¶ 8, 9, 11, 12, 14, 16, 18, 20, 22, 23). Further, Plaintiffs allege that "visitors often share highly sensitive personal data" which reinforces that Plaintiffs are alleging that Defendant violated section 631(a) through recording a transcript of visitor's conversation and not the entirety of a visitor's interaction with Defendant's Website. Plaintiffs cannot add facts in their Opposition that were not pleaded. For this reason, this Court should find Plaintiffs' arguments regarding "Session Replay" and automatic routing software to be unpersuasive.

Plaintiffs did not adequately plead that Defendant or the third party intercepted the messages in transit and therefore, Defendant was not sufficiently on notice. This Court should find Plaintiffs' claims under the second clause of section 631(a) fail. However, Plaintiff may be able to cure deficiencies so amendment should be allowed.

C. Plaintiffs Fail to Plead Section 632.7 Claims

Plaintiffs fail to sustain a claim under section 632.7 which dictates that "every person who, without the consent of all of the parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication...shall be punished[.]" Cal. Penal Code § 632.7 (West 2022). They urge this

Court to interpret "landline telephone" as inclusive of computer equipment. For the following reasons, this Court should decline to do so.

No California or federal court has explicitly addressed the question of expanding section 632.7 to include computer equipment. Plaintiffs argue that because the "Legislature defined the term "Communication," to include data transmissions" it supports a broad interpretation of the types of technology covered under section 632.7. (Opposition at 12). This Court should disagree.

In answering questions of state law, this Court is bound by the decisions of the California Supreme Court. When the California Supreme Court has not spoken on a particular issue, this Court must determine what result the Supreme Court would reach based on state appellate court opinions, statutes, and treatises. *Vernon v. City of L.A.*, 27 F.3d 1385, 1391 (9th Cir. 1994) (citing cases).

In the absence of guiding authority from the California Supreme Court, this Court looks to decisions of the California Court of Appeal as persuasive authority on the interpretation of California statutes. A recent decision of the California Court of Appeal supports a plain-language reading of section 632.7 to include the requirement that only types of phones listed in the statute are included.

In *Hataishi v. First American Home Buyers Protection Corp.*, 223 Cal.App.4th 1454, 1469 (2014), the court of appeal affirmed the trial court's denial of class certification in a class action lawsuit alleging surreptitious recording of confidential communications in violation of section 632 of the California Penal Code. The trial court had ruled that individual factual questions predominated, which defeated class certification. *Id.* at 1468. The plaintiff, on appeal, argued that amending the complaint to add a claim under section 632.7 would ameliorate the need for individualized proof, since there is no need to determine, for purposes of section 632.7, the content of each communication or each class member's expectation of confidentiality. *Id.* at 1468–69. The court of appeal rejected this argument on two bases: first, the plaintiff had not filed a formal motion to amend, and second, section 632.7 also requires individualized proof. *Id.* at 1469. The court of appeal held that individualized proof is required under section 632.7 to "determine what type of telephone was used to receive the subject call." *Id.*

Under California law, statutory interpretation "begins with the words themselves… because the words generally provide the most reliable indicator of [legislative] intent." *Herrera*, 953 F.3d at 1071. Additionally, "if there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1103 (2007). Under section 632.7,

> [e]very person who, without the consent of all parties to a communication, intercepts or receives and intentionally records ... a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be [guilty of a crime.]

Cal. Penal Code § 632 (West 2020).

The plain text of section 632.7 suggests that an ***exclusive*** list of five types of calls are included: a communication transmitted between (1) two cellular radio telephones, (2) a cellular radio telephone and a landline telephone, (3) two cordless telephones, (4) a cordless telephone and a landline telephone, and (5) a cordless telephone and a cellular radio telephone. Accordingly, the communication must have a cellular radio or cordless telephone on one side, and a cellular radio, cordless, or landline telephone on the other side.

The Legislature defined cellular radio telephone and cordless phone. It did not define landline telephone. However, the statute references "frequency bandwidth reserved for cellular radio telephones," "frequency bandwidths reserved for cordless telephones," and "public switched telephone network" which suggests the Legislature intended only to include communications through telephone technology. Further, the statute's broad definition of communication (which "includes, but is not limited to, communications transmitted by voice, data, or image, including facsimile") does not support Plaintiffs' conclusion that the Legislature meant to include new and emerging technologies, but rather meant to protect a broad range of information transmitted over telephone technology. Cal. Penal Code § 631 (West 2020).

The legislative history of the statute confirms the plain reading analysis that section 632.7 does not extend protection to communications over the internet.

The Legislature's ability to amend section 632.7 and the fact that it has amended CIPA many times is indicative of its intent to leave the statute unchanged. *See, e.g.,* Cal. Penal Code §§ 632 (amended 2016), 633 (amended 2018), 633.5 (amended 2017), 633.6 (same), 633.8 (amended 2011), 636 (same), 637 (same), 637.2 (amended 2016) (West 2022). The Legislature amended section 632.7 in June 2022 but did not include internet or web communications in its scope. Cal. Legis. Serv. Ch. 27 (S.B. 1272) (West) (amending section 632.7 which took effect January 1, 2023). In fact, the amendments added a liability exemption for "telephone companies" which further indicates this statute is limited to telephone communications.

This Court should determine section 632.7 only applies to the five conversations enumerated above. Plaintiffs do not meet their burden under section 632.7 because their pleadings do not allege they communicated with Defendant using telephone technology.

Plaintiffs allege they accessed Defendant's chat feature using "either a smart phone (a cellular telephone with an integrated computer and an operating system that enables web browsing) or a wifi-enabled laptop that uses a combination of cellular and landline telephony." (FAC ¶ 17). First, assuming Plaintiffs used a smart phone in their conversation with Defendant, this Court agrees with the reasoning in *Mastel* where the court determined that "although iPhones contain the word 'phone' in their name," plaintiff was using "a feature of the portion of the iPhone that functions as a computer, not the phone." *See Mastel*, 549 F. Supp. 3d at 1135. Similarly, here, Plaintiffs were using the function of their smart phone that operates like a computer which falls outside of the scope of section 632.7. Second, assuming Plaintiffs used a wifi-enabled laptop, Plaintiffs' conclusory pleadings that such a laptop utilized "a combination of cellular and landline telephony" does not meet the definition of a cellular radio, cordless, or

landline telephone under section 632.7. (*Id.*). Lastly, Plaintiffs similarly allege Defendant's ***internet*** chat feature used "a combination of landline telephony and cellular telephony" which for the same reasons as above fails to satisfy section 632.7. (*Id.* ¶ 34).

This Court should determine that section 632.7 was intended to apply to a narrow set of communication over telephone technology. Plaintiffs' allegation that they used a smart phone or a wifi-enabled laptop to communicate with Defendant's internet chat feature does not meet this standard.

Plaintiffs' claim under section 632.7 should fail and amendment would prove futile as Plaintiffs cannot allege communication with Defendant's internet-based chat falls under the specified telephone technologies. This Court should, therefore, grant the motion as to the second of action without leave to amend.

III. RECCOMENDATION

In sum, I recommend the Motion be **GRANTED** and Plaintiffs' action be **DISMISSED** ***with leave to amend*** in part and **DISMISSED** ***without leave to amend*** in part. On Plaintiffs' first cause of action under section 631(a), there is no set of facts to sustain a claim for Defendant recording the chat conversation under the first clause, however, they could plausibly allege facts to state a viable claim under the second clause. Thus, the Motion should be granted with leave to amend as to the first cause of action. On the second cause of action, Plaintiffs cannot allege any set of facts to sustain a claim as Defendant's internet chat feature does not and cannot meet the definition of any of section 632.7's enumerated telephone technologies. The Motion should be granted without leave to amend as to the second cause of action.

Applicant Details

First Name	**Catherine**
Middle Initial	**G**
Last Name	**Kinley**
Citizenship Status	**U. S. Citizen**
Email Address	**kinlcg21@wfu.edu**
Address	**Address** Street **7723 Athens rd** City **Stokesdale** State/Territory **North Carolina** Zip **27357** Country **United States**
Contact Phone Number	**3364306892**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2021**
JD/LLB From	**Wake Forest University School of Law** **http://www.law.wfu.edu**
Date of JD/LLB	**May 20, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Wake Forest Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Stanley Moot Court Competition** **Wake Forest Law Moot Court Board Member** **Walker Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Schang, Scott
schangs@wfu.edu
Boike, Elise
ekboike@gmail.com
(248) 622-3477
Taylor, Margaret
taylormh@wfu.edu
(336) 758-5897

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 04, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am writing to apply for a clerkship in your chambers beginning in 2024, or during a later term. I am a rising third-year student at Wake Forest University Law School, where I actively contribute to the Wake Forest Law Review and Moot Court team. I have attached a resume, law school grade sheet, and a writing sample.

What sets me apart as an applicant is my unique perspective as a first-generation college student. Growing up in an environment where higher education was not a common path, I have cultivated a strong work ethic, resilience, and resourcefulness that have been instrumental in my academic achievements. This background allows me to approach legal issues with a fresh and empathetic perspective, making me well-suited for the challenges of a clerkship.

My persistent dedication to public service is exemplified by my involvement with legal aid organizations both during my undergraduate studies and throughout law school. In addition, I am a committed member of Wake Forest Law's Pro Bono Honor Society. These experiences have allowed me to actively contribute to the well-being of underserved communities and solidified my commitment to advocating for the rights of the underrepresented.

Professors Scott Schang and Margaret Taylor as well as attorney Elise Boike have submitted separate letters of recommendation on my behalf. If there is any other information that might be helpful, please let me know. I would welcome the opportunity to interview with you. Thank you for your consideration.

Sincerely,

Grace Kinley

Grace Kinley

Winston-Salem, NC
Kinlcg21@wfu.edu | (336)430-6892

EDUCATION

WAKE FOREST UNIVERSITY SCHOOL OF LAW
Juris Doctor Candidate, May 2024
GPA: 3.655, Class Rank: 22/151 (Top 15%)

Honors: *Wake Forest Law Review* Staff Member; Dean Reynolds Award Recipient in Torts (Highest Grade); George K. Walker Moot Court Competition (Top 16); Pro Bono Honor Society

Activities: Teacher's Assistant Position: Torts; Moot Court Board Member; Edwin M. Stanley Moot Court Competition; UNC Townsend Trial and Zeliff Trial Competitions; Transactional Law Competition; Environmental Law Clinic; Part-time Library Desk and IT Help Desk Assistant

Pro Bono: Project Coordinator for Immigration Pro Bono Project; Wills, Expungements, Know Your Rights, Healthcare Advocacy

UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL
Bachelor of Arts, *cum laude*, May 2021
GPA: 3.619

- Major in Political Science, Major in Peace War and Defense, Minor in History
- Study Abroad: Burch Field Research Seminar in the U.K. and Ireland

LEGAL EXPERIENCE

RAYBURN COOPER & DURHAM, P.A. – Charlotte, NC
Summer Associate May 2023 – August 2023

- Researched a variety of legal issues including bankruptcy issues and contract disputes
- Managed large document review projects
- Assisted with litigation and mediation preparation
- Drafted blog posts summarizing recent NC Business Court decisions for RCD's "Business Court Blast"

LAKESHORE LEGAL AID – Detroit, MI
Summer Law Clerk: May 2022 – August 2022

- Appeared in the 36th District Court before the Honorable Judge Ruth Ann Garrett
- Provided legal representation to low-income tenants during nonpayment and termination of tenancy hearings
- Conducted intakes to ensure tenants' eligibility for nonprofit services
- Performed legal clerical work – created spreadsheets with party, compliance, and lawsuit status information
- Drafted legal documents, communicated directly with clients, and completed legal research and trial preparation

LEGAL AID OF NORTH CAROLINA – Pittsboro, NC
Intern: March 2020 – June 2020

- Organized a pro bono wills clinic with the Marian Cheek Jackson Center and Orange County Bar Association
- Coordinated wills and end-of-life document drafting for low-to-moderate-income residents
- Partnered with Attorney, Erin Haygood, shadowing her in court and assisting her with tasks and organization

OTHER EXPERIENCE

CAROLINA POLITICAL REVIEW – Chapel Hill, NC
Staff Contributor: August 2020 – May 2021

UNC CALL CENTER – Chapel Hill, NC
Student Caller: September 2018 – March 2020

VARIOUS RESTAURANTS – Chapel Hill and Greensboro, NC
Server/Hostess: October 2016 – August 2021

(/StudentSsb/)

Kinley, Grace

View Grades

Student Grades - Kinley, Grace (06628562)

All Terms **Law**

GPA Summary View Details

-	3.655	-	3.655
All Terms	Institutional	Transfer	Overall

Course Work

Search by Course Title or Subject Code (OPTION+Y)

Subject	Course Title	Campus	Midterm Grade	Final Grade	Attempted Hours	Earned Hours	GPA Hours	Quality Points	CRN	Term	Action
LAW 595, 1P	Law Review	LW		P	2.000	2.000	0.000	0.000	14366	Spring 2023	
LAW 690, 1P	Environmental Law Clinic	LW		H	4.000	4.000	0.000	0.000	25642	Spring 2023	
LAW 442, 1	Sales & Secured Transactions	LW		A-	3.000	3.000	3.000	11.010	27331	Spring 2023	
LAW 534, 1	Intellectual Property	LW		A-	3.000	3.000	3.000	11.010	28218	Spring 2023	
LAW 508, 1	Family Law	LW		A-	3.000	3.000	3.000	11.010	29133	Spring 2023	
LAW 200, 1	Legislation and Admin Law	LW		A	3.000	3.000	3.000	12.000	60061	Fall 2022	
LAW 207, 1	Evidence	LW		A	4.000	4.000	4.000	16.000	60065	Fall 2022	
LAW 209, 1	Constitutional Law II	LW		A-	3.000	3.000	3.000	11.010	60066	Fall 2022	
LAW 219, 1	Appellate Advocacy LAWR III	LW		A-	2.000	2.000	2.000	7.340	60067	Fall 2022	
LAW 595, 1P	Law Review	LW		CR	0.000	0.000	0.000	0.000	60389	Fall 2022	
LAW 512, 1	Environmental Law	LW		B+	3.000	3.000	3.000	9.990	61463	Fall 2022	
LAW 120, 4	Constitutional Law I	LW		A-	3.000	3.000	3.000	11.010	10025	Spring 2022	
LAW 105, 4	Civil Procedure II	LW		B+	3.000	3.000	3.000	9.990	19836	Spring 2022	
LAW 119, 4A	Legl Analysis, Writng & Res II	LW		A	2.000	2.000	2.000	8.000	19837	Spring 2022	
LAW 111, 4	Property	LW		A-	4.000	4.000	4.000	14.680	19838	Spring 2022	
LAW 102, 4	Contracts II	LW		A-	3.000	3.000	3.000	11.010	22554	Spring 2022	
LAW 122, 4A	Professional Development	LW		A*	1.000	1.000	0.000	0.000	23456	Spring 2022	
LAW 113, 4A	LAWR II (Research)	LW		B+	0.500	0.500	0.500	1.665	25608	Spring 2022	

Subject	Course Title	Campus	Midterm Grade	Final Grade	Attempted Hours	Earned Hours	GPA Hours	Quality Points	CRN	Term	Action
LAW 104, 4	Civil Procedure I	LW		A-	3.000	3.000	3.000	11.010	98877	Fall 2021	
LAW 101, 4	Contracts I	LW		B+	3.000	3.000	3.000	9.990	98879	Fall 2021	
LAW 103, 4	Criminal Law	LW		B+	3.000	3.000	3.000	9.990	98881	Fall 2021	
LAW 108, 4	Torts	LW		A+	4.000	4.000	4.000	16.000	98883	Fall 2021	
LAW 110, 4A	Legl Analysis, Writing & Res I	LW		B+	2.000	2.000	2.000	6.660	98886	Fall 2021	
LAW 112, 4A	LAWR I (Research)	LW		B+	0.500	0.500	0.500	1.665	98890	Fall 2021	
LAW 122, 4A	Professional Development	LW		S	0.000	0.000	0.000	0.000	98894	Fall 2021	

WAKE FOREST
UNIVERSITY
SCHOOL *of* LAW

March 31, 2023

To Whom It May Concern:

I write to heartily recommend Grace Kinley for a judicial clerkship. Grace was a student in my Environmental Law class and is currently a clinician in the Environmental Law and Policy Clinic. I have been lucky to interact with Grace over the past year, and she is one of the strongest overall students I have had at Wake Forest.

Grace is one of those students who can surprise you. She can be quiet and unassuming, but she often contributes the most insightful and helpful comments in class and in Clinic. As a clinician, she has shown herself to be a consummate teammate, working hard to keep her matters on track and her fellow students on task. Grace has worked on an heirs' property matter this semester where her contributions were singled out by our law fellow, Jesse Williams, as among the strongest in the Clinic. Grace has also worked on an environmental matter this semester where her teammate has not pulled her weight, but Grace has kept her composure, ensured the client still receives the best advice, and undertaken excellent research and counseling.

Grace is a thoughtful person who can be underestimated because of her quiet, self-deprecating manner. But if I were selecting a student to work with me over the summer to keep our matters running smoothly, Grace would be my go-to student. Her ability to master research, write well, and work well with others make her the kind of well-rounded law student who will excel in practice.

If you have any questions or would like further information, please do not hesitate to contact me at 202-674-6076 or schangs@wfu.edu.

Sincerely yours,

Scott E. Schang
Professor of Practice
Director, Environmental Law & Policy Clinic

P.O. Box 7206 | Winston-Salem, NC 27109

June 09, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am very pleased to recommend Grace Kinley for a clerkship position in your chambers. I am a staff attorney at Lakeshore Legal Aid and was fortunate to work directly with Grace during her 2022 Summer Internship with our organization. One of the chief reasons I believe Grace to be a strong candidate for your team is her ability to intuit the next steps in a case and her willingness to take the next steps to assist clients in any way necessary. Grace was also an invaluable member of our team due to her willingness to assist others in our department. Grace regularly offered to step in and assist other legal assistants, law clerks and attorneys in their tasks, in addition to her own assignments and tasks.

Additionally, Grace was extremely organized, prompt and eager to learn more. She eagerly accepted every opportunity offered to her in order to grow and experience as much as possible. Our department specifically defends indigent tenants facing eviction in Detroit. Grace worked daily with clients who often had complex legal and social issues pertaining to their case, and Grace treated each client with respect and care. She listened carefully and thoughtfully and regularly identified legal issues. Grace brought enthusiasm, humor and intelligence to her internship, and she would be a wonderful addition to your office. I am confident in her ability and the future lawyer she will become.

Please do not hesitate to reach out to me with any questions.

Thank you,

Attorney Elise Boike
Lakeshore Legal Aid

Elise Boike - ekboike@gmail.com - (248) 622-3477

WAKE FOREST UNIVERSITY
SCHOOL of LAW

Margaret H. Taylor
Professor of Law

Telephone: (336) 758-5897
FAX: (336) 758-4496
Email: taylormh@wfu.edu

June 2, 2023

Letter of Recommendation for Clerkship Applicant Catherine (Grace) Kinley
JD Candidate, Wake Forest University School of Law, 2024
Uploaded via OSCAR

Dear Judge:

I am writing to recommend Catherine (Grace) Kinley to be your judicial clerk. Grace is a member of the Class of 2024 at Wake Forest University School of Law. She is in the top fifteen percent of her class and has an impressive list of extracurricular activities, which includes being named to the Wake Forest Law Review and the Moot Court Board. Importantly, Grace accomplished this while holding down several part-time jobs during the school year (including as a Library Desk and IT Help Desk Assistant). Similarly, as a first-generation college student who graduated *cum laude* from the University of North Carolina at Chapel Hill in 2021, Grace worked throughout her undergraduate career to support herself as an undergraduate student.

Grace was a student in my Torts class in her first year of law school, and out of forty-two students in my class that year I selected her to be my Teaching Assistant the following year. I knew that Grace would be an excellent role model and mentor to 1L students; I also had the utmost confidence in her substantive knowledge, analytical ability, work ethic, and stellar interpersonal skills. Grace's work last year far exceeded my expectations. She helped to create a community among our first-year students, provided support to and answered questions from 1Ls, and gladly said "yes" to each request from me. Grace consistently met deadlines and took appropriate initiative, and overall was an excellent TA.

I recommend Grace to be your judicial clerk with tremendous enthusiasm. I believe she would be a real asset to your chambers. Please do not hesitate to contact me if I can provide any additional information.

Sincerely,

Margaret H. Taylor

Margaret H. Taylor
Professor of Law

Worrell Professional Center | P.O. Box 7206 | Winston-Salem, NC 27109

Grace Kinley
Winston-Salem, NC
Kinlcg21@wfu.edu
(336) 430-6892

Writing Sample

As a second-year student at Wake Forest University School of Law, I prepared the attached brief for my Appellate Advocacy Course. I wrote the brief in support of reversing the grant of summary judgment to a school that punished a student for exercising his First Amendment rights by wearing a political T-shirt. My professor permitted me to use this brief as a writing sample.

RECORD NO. 22-823

In the
United States Court of Appeals
for the Sixth Circuit

GAVIN PAINTER, by and through his father, DONALD PAINTER,
Plaintiff-Appellant,

v.

AMY DOYLE, SUPERINTENDANT; EDISON MAGNET MIDDLE SCHOOL; and DAYTON PUBLIC SCHOOL SYSTEM,
Defendants-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF OF APPELLANT

Grace Kinley

ISSUE PRESENTED

I. Under *Tinker*, which allows schools to prohibit speech that causes disruption or risk of disruption, can a school administrator discipline a student that did not cause an actual disruption for creating a potential risk of disruption without providing a constitutionally valid justification for anticipating disruption?

ARGUMENT

This Court should reverse the district court's decision because Gavin's speech was not disruptive to the School's educational mission. Gavin brought this action by and through his father, Donald Painter, under 42 U.S.C. § 1983, which provides a cause of action for individuals when a person acting under color of law violates their constitutional rights. 42 U.S.C. § 1983. The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law abridging the freedom of speech." U.S. Const. amend. I. The Due Process Clause of the Fourteenth Amendment applies the First Amendment to the states and "protects the citizen against the State itself and all of its creatures–Board of Education not excepted." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id*. at 506. Students' rights to freedom of speech must be carefully protected "if we are not to strangle the free mind at its source." *Id*. at 507. While students' constitutional rights in school are not "coextensive with the rights of adults in other settings," the classroom is a "marketplace of ideas" that requires the freedom to engage in a robust discussion of ideas and viewpoints. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986);

Id. at 512. Although school officials can limit student speech, schools must show a constitutionally valid reason for doing so. *Fraser*, 478 U.S. at 682; *Tinker*, 393 U.S. at 511. Generally, for a school's prohibition of student speech to be sustained, the school must show that the forbidden conduct "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (*quoting Burnside v. Byars* 363 F.2d 744, 749 (5th Cir. 1966)).

There are three exceptions to this general rule. First, schools have the discretion to prohibit speech, without a showing of disruption, if the speech is "lewd, indecent, or offensive." *Fraser*, 478 U.S. at 683. Second, if the speech at issue is school-sponsored, then the school may regulate it "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Finally, a school may restrict speech reasonably viewed as promoting illegal drug use. *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

Both parties have stipulated that Gavin's shirt was not school-sponsored speech, nor was it advocating illegal drug use, so these exceptions are not at issue here. The remaining issue is whether the School had a constitutionally valid justification for suppressing Gavin's speech under the standard in *Tinker*. Gavin's shirt did not materially and substantially interfere with the operation of the School. Accordingly, the School did not have a constitutionally valid justification to prohibit Gavin's speech, and the district court erred in granting the School's Motion for

Summary Judgment. Therefore, this Court should find in favor of Gavin and reverse the district court's decision.

I. The district court erred in holding that Gavin's shirt materially and substantially interfered with the School's operation because Gavin's shirt did not cause any disruption, and the School did not show a constitutionally valid reason to forecast such a disruption.

Gavin's shirt did not materially and substantially interfere with the School's operation because it did not cause an actual substantial disruption, and the School did not show a constitutionally valid reason to forecast disruption. While school officials have a limited ability to suppress disruptive speech, an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 507–08. To prohibit student speech under *Tinker*, a school must show that a substantial disruption occurred or demonstrate specific facts that led the school to reasonably forecast a substantial disruption. *Id*. at 514. Here, no substantial disruption occurred, and the School did not demonstrate specific facts that support a reasonable forecast of disruption. Accordingly, Gavin's shirt did not materially and substantially interfere with the operation of the School.

A. The district court erred in holding that Gavin's shirt caused a material disruption because it did not disrupt classwork or invade the rights of others.

Gavin's shirt did not cause an actual substantial disruption because the shirt did not disrupt classwork or invade the rights of others. A substantial disruption "disrupts classwork or involves substantial disorder or invasion of the rights of others" *Id*. at 513. A display of speech invades the rights of others when it leads to threats or acts of violence. *Id*. at 508.

In *Tinker*, school officials suspended students who wore black armbands to school when they refused to remove them. *Id.* at 504. Since only a few students wore the armbands, there was no indication that they disrupted class. *Id.* at 508. Although some students made hostile remarks to the students wearing the bands, there were no threats or acts of violence. *Id.* The Supreme Court held that since the armbands did not interfere with school work nor "concern aggressive, disruptive action or even group demonstrations," the speech was a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id.* Therefore, the armbands did not constitute a material and substantial disruption, and the school officials could not constitutionally prohibit them. *Id.* at 514.

Here, Gavin's shirt did not constitute an actual material disruption because it did not cause interference with school work. In *Tinker*, the armbands did not interfere with school work because they were a silent, passive expression of opinion. Likewise, Gavin's shirt did not interfere with school work because it was a silent, passive expression of opinion. Further, in *Tinker*, the armbands did not disrupt class because only a few students wore them. Similarly, Gavin did not disrupt class because he was the only student wearing the shirt. Gavin did not behave disruptively because he individually and silently walked into class wearing a shirt that expressed his political opinion. While Gavin's shirt did change the class topic for the day, this change was beneficial, not disruptive. Cook reserves part of her class time for current events, and the School takes pride in encouraging students to discuss issues respectfully. Gavin's shirt did not interfere with school work because

Cook used the shirt as an opportunity to further the school's mission and provide a forum to respectfully discuss immigration.

Further, Cook did not end her class early because of any disruption caused by Gavin's shirt. Cook made the last twenty minutes of class a study hall so she could call Doyle. While the call may have interfered with class time, Gavin did not cause the interference. The class was engaging in a respectful discussion, but Cook still called Doyle to prevent her from being surprised and looking bad on camera. Cook's personal decision to protect Doyle's image was responsible for the shorter class time, not Gavin's shirt. Gavin's shirt did not interfere with school work because it contributed to a beneficial class discussion on a topic that was relevant to the curriculum of the class and aligned with the School's educational mission.

Additionally, Gavin's shirt did not constitute an actual and substantial disruption because it did not invade the rights of others. Here, like the facts in *Tinker*, there were no threats or acts of violence; however, like the facts in *Tinker*, some students reacted with hostility to the students wearing the armbands, here, the School interpreted some students' responses to Gavin's shirt to be hostile. Reyes was the only student to refer directly to Gavin's shirt as "creepy." Reyes did later slap Gavin but stated that this was for reasons unrelated to the shirt. The School perceived some students to be pointing and saying things like "creep" and "weirdo" to Gavin but did not know if his shirt caused the comments. Even if it were clear that the students were directing their comments at Gavin's shirt, these comments did not equate to threats or acts of violence. Since Gavin's shirt, at worst, caused

hostile remarks from other students, it did not lead to threats or acts of violence. Because the shirt did not lead to threats or acts of violence, it did not invade the rights of others and, therefore, did not constitute an actual and material disruption.

Furthermore, Doyle did not cancel the Judge's talk because of material disruption. Doyle canceled the talk before she even arrived at the auditorium or saw Gavin's shirt. She did not rely on observing an actual disruption as her basis for canceling the talk since she did so before she arrived. While Doyle thought a disruption occurred in Cook's class based on their phone call, this was a misunderstanding. Cook told Doyle that Reyes had slapped Gavin but did not provide context as to why. Doyle relied on this slap as evidence of Gavin's shirt being disruptive when the slap was actually for unrelated reasons. Doyle canceled the talk based on a misunderstanding, not based on Gavin's shirt causing any disruption. Thus, a substantial disruption was not the basis for the cancellation. Gavin's shirt did not cause an actual disruption because the shirt neither interfered with school work nor invaded the rights of others.

B. The district court erred in finding that Gavin's shirt caused a reasonable forecast of material disruption because the School did not show a specific and constitutionally valid reason to anticipate a disruption.

The School did not show a specific and constitutionally valid reason to anticipate a material disruption. To prohibit student speech without an actual disruption, a school must show specific and constitutionally valid reasons to anticipate that the prohibited speech would substantially interfere with the school's functioning. *Id.* at 509–511. While school officials do not have to wait until a

disturbance occurs, the prohibition of speech based on a forecast of disruption must be reasonable and "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id*. at 510.

The School did not show a specific and constitutionally valid reason to forecast a substantial disruption because Doyle based her forecast on a distant and unrelated incident. When a school seeks to prohibit speech based on prior incidents, it must "point to a particular and concrete basis for concluding that the association is strong enough to give rise to a well-founded fear of genuine disruption." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002) (holding that, despite experiencing a pattern of disturbing racial incidents, a school was unjustified in prohibiting a student from wearing a shirt with the word redneck because the school did not show that the association between the prior instance and the shirt was strong enough).

Here, like the school in *Sypniewski*, which prohibited the shirt with the word redneck based on the school's history of disturbing racial incidents, Doyle based her ban of Gavin's shirt on a prior incident in which a group of students disrupted school by bringing nude paintings to school. In *Sypniewski*, a disturbing pattern of racial incidents was insufficient to support a school's prohibition of shirts with a race-related term. In that case, there was a relationship between the prior instances and the School's prohibition because racial terminology could contribute to disturbing racial incidents. But here, there is no meaningful relationship between

Gavin's shirt and the prior students' nude paintings. Here, the prior event involved nudity and a group of students, while Gavin's shirt was a silent display of a political opinion, and he was the only participant. The School's basis for prohibiting Gavin's shirt is even less concrete than the school's basis in *Sypniewski*. Accordingly, the prior incident of disruption that Doyle used to justify her forecast of disruption is not a constitutionally valid reason to forecast disruption.

Further, the School did not show a specific and constitutionally valid reason to forecast a substantial disruption because the school unreasonably assumed that Gavin's silent display of opinion would substantially interfere with the School's operation. Passive expression of one's viewpoint through clothing is not inherently disruptive and, therefore, cannot be suppressed absent a constitutionally valid reason to anticipate that it would lead to disruption. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992). In *Chandler*, school teachers went on strike, and in response, the school hired replacement teachers. *Id*. At 526. Students wore buttons in protest that referred to the replacement teachers as "scabs." *Id*. The Court held that although the buttons could be considered insulting to the teachers, the school officials could not have reasonably forecasted that they would disrupt the school's operation because the students silently conveyed an opinion in a non-disruptive manner. *Id*. at 530.

Here, Gavin's act of wearing a shirt, like the act of wearing a button in *Chandler*, was a way of silently expressing an opinion in a non-disruptive manner. The buttons in *Chandler* could have been insulting to the teachers. Likewise,

Gavin's shirt could have insulted the Judge; however, this potential for insult did not support a reasonable forecast of disruption in *Chandler* and also did not support a reasonable forecast of disruption here. Judges have experience being around people who may disagree with their viewpoints. Here, the Judge would most likely not have even been insulted by a child's shirt, and even if he did take issue with it, he certainly would have kept his composure and not caused a material and substantial disruption. Concern that Gavin's political expression may be insulting is insufficient justification for forecasting a substantial disruption.

Also, the age of the students in the auditorium was not a constitutionally valid reason to anticipate a substantial disruption. *See Fraser*, 478 U.S. at 683 (holding that the maturity of the students exposed to speech is relevant in determining if it is appropriate for school officials to prohibit the speech). Doyle feared Gavin's shirt may have caused a disruption because sixth-grade students were in the auditorium. This forecast is unreasonable because the School is for exceptional students, has a rigorous admission process, and prides itself on teaching the students respect. The rigorous admission process means that only great students attend this school. A room full of exceptional students who survived a rigorous admission process and received lessons on respecting others' views would not become disruptive simply because they saw a shirt.

Because of the exceptional maturity of even the youngest sixth graders, there was no need for concern about the shirt affecting them. The students most likely would not have been affected by Gavin's shirt, and accordingly, the age of these

students was not a constitutionally valid reason to anticipate a substantial disruption. Neither the prior unrelated incident, the potential insult to the Judge, nor the age of the students in the auditorium is a constitutionally valid justification for anticipating a material disruption. Therefore, the School did not show a specific and constitutionally valid reason to anticipate that Gavin's shirt would cause a substantial disturbance and the District Court erred in granting the School's Motion for Summary Judgment.

CONCLUSION

For the reasons stated herein, appellant respectfully requests that the Court reverse the district court's decision.

This is the 12th day of October, 2022.

Grace Kinley

Applicant Details

First Name	**Sean**
Last Name	**Klasson**
Citizenship Status	**U. S. Citizen**
Email Address	**smk61624@uga.edu**
Address	**Address** Street **32 Forest Meadows Dr.** City **Rome** State/Territory **Georgia** Zip **30165** Country **United States**
Contact Phone Number	**7063316856**

Applicant Education

BA/BS From	**Duke University**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Georgia School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=51102&yr=2011**
Date of JD/LLB	**May 18, 2024**
Class Rank	**25%**
Law Review/ Journal	**Yes**
Journal(s)	**Georgia Journal of International & Comparative Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Beck, J. Randy
rbeck@uga.edu
706-542-5216

Coenen, Dan T.
coenen@uga.edu
706-542-5301

Davis, Andy
adavis@brinson-askew.com

Shipley, David E.
shipley@uga.edu
706-542-5184

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sean Klasson
32 Forest Meadows Drive
Rome, GA 30165
(706) 331-6856
smk61624@uga.edu

June 9, 2023

Honorable Leslie Abrams Gardner
Chambers of Judge Leslie Abrams Gardner
201 West Broad Avenue
Albany, Georgia 31701

Re: Post-Graduate Clerkship

Dear Judge Abrams Gardner:

I am a rising third-year student at the University of Georgia School of Law, and I am writing to apply for a post-graduate clerkship under you in the Middle District of Georgia. At this point in my legal education, I am most interested in Constitutional Law and hope pursue a career in litigation and potentially the judiciary. I am an intensely curious individual who relishes taking on complex issues from an unbiased perspective, and I am working to forge a career where I am continuously learning and being challenged—while serving others. I can think of no better way to further these goals than clerking in a federal district court.

I believe my academic and professional experiences have provided a strong foundation that will allow me to contribute to your Court. As a passionate student of history, I have extensive experience researching issues to bring forth objective, reasoned analysis. To tailor these skills to the legal context, I am an active member of the Executive Board of the Georgia Journal of International & Comparative Law and have taken the Writing for Judicial Clerkships drafting course.

Last summer, I had the opportunity to draft and revise legal motions in both state and federal litigation, as well as leading the amendment process for my hometown's city charter. I will continue to gain experience in litigation this summer while working at Harris Lowry Manton. I have experience in both criminal and civil proceedings from my work at the Floyd County District Attorney's Office, Brinson Askew Berry, and Harris Lowry Manton. Furthermore, my experience at Brinson Askew Berry presented a unique opportunity to assist with a diverse set of cases running across many doctrinal lines, from breach of contract and tort claims to divorce proceedings, employment discrimination, and municipal governance. I believe this broad set of experiences will help me contribute to a court with such a broad and varied case load.

Enclosed you will find a copy of my resume, transcript, writing sample, and letters of recommendation. Thank you for taking the time to consider my application.

Sincerely,

Sean Klasson

Sean Klasson

Sean Michael Klasson

smk61624@uga.edu • 32 Forest Meadows Drive • Rome GA 30165 • (706) 331-6856

EDUCATION

University of Georgia School of Law — Athens, Georgia
Juris Doctor — Expected May 2024
GPA: 3.59 (Rank 44/191)
Honors: Law School Association Scholarship
Journal: Senior Conference Editor; The Georgia Journal of International and Comparative Law
Activities: Research Assistant for Professor Coenen (Constitutional Law); Federal Bar Association; Business Law Society

Duke University. — Durham, North Carolina
B.S. in Economics, B.A. in History, Classical Civilizations minor — May 2018
GPA: 3.55/4.00
Honors: Phi Alpha Theta National History Honor Society
Activities: Study Abroad: Oxford and London School of Economics (Full Year Term); Sigma Phi Epsilon, Alumni Coordinator; Arabic/English Language Instructor

PROFESSIONAL & LEADERSHIP EXPERIENCE

Harris Lowry Manton, LLP — Savannah, Georgia
Summer Law Clerk — June 2023 – August 2023

Brinson, Askew, Berry, Seigler, Richardson & Davis, LLP — Rome, Georgia
Summer Law Clerk — May 2022 – July 2022

- Analyzed and researched legal issues for clients and prospective clients.
- Drafted various legal papers, including case theory memoranda, discovery requests, transactional agreements, and correspondence with clients, co-counsel, and opposing counsel.
- Attended meetings with clients and identified deliverables and action items needed to realize client objectives.

Floyd County District Attorney's Office — Rome, Georgia
Legal Intern — June – August 2021

- Performed research on relevant statutes and case law in preparation for upcoming trials and plea agreements.
- Reviewed case files to provide fact-specific strategic advice for trials and plea agreements.

Texas Public Policy Foundation — Austin, Texas
Legal Research Associate — May – August 2016

- Published articles on juvenile justice, criminal reentry, and other critical justice issues.
- Researched criminal justice reform in the United States, and formally presented findings on civil asset forfeiture abuse and reform.

Walmart eCommerce — San Bruno, California
Category Specialist/Business Analyst — May 2019 – January, 2021

- Owned the P&L statement of three structurally unique digital businesses, the largest representing $20M in annual sales.
- Inherited and managed +$1M inventory overstock position against strict deadlines while preserving product margin and revenue.
- Served as team lead on topics including search engine optimization (SEO), marketplace sales (3rd party vendors), and pricing strategy.

Jordan-Blanchard Capital. — Columbus/Atlanta, Georgia
Private Equity/Hedge Fund Intern — May-August 2017

- Analyzed prospective companies for acquisition with enterprise valuations ranging from $5-$50M.
- Performed due diligence during the first prospective sale of a portfolio company in the firm's history.
- Created and reviewed financial models and financial statements for companies in the private equity portfolio.

Additional Information

- Avid basketball fan and amateur player.
- Personal interest in Stoic Philosophy

/StudentSelfService/)

Sean M. Klasson

Student Unofficial Transcript

Unofficial Transcript

Transcript Level

Law

Transcript Type

Unofficial Web

Student Information Institution Credit Transcript Totals Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Name
Sean M. Klasson

Birth Date
04-صفر

Curriculum Information

Program : Juris Doctor

College
School of Law

Major and Department
Law, School of Law

Institution Credit

Term : Fall 2021